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No. 75-487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,

Petitioner,

v.

ARTHUR LAWRENCE ABRAMS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The United States Attorney for the District of New Jersey, on behalf of the United States District Court for the District of New Jersey, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The *en banc* opinion of the Court of Appeals (App. A, *infra*, pp. 1-35a) is not as yet officially reported. The *en banc* opinion and order of the district court (App. D, *infra*, pp. 39-52a) is reported at 385 F. Supp. 1210. The opinion of the New Jersey Supreme Court (App. E, *infra*, pp. 53-61a) is reported at 65 N.J. 372 and at 320 A.2d 471.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1975 and was thereafter modified on July 14, 1975 (App. B & C, *infra*, pp. 36-38a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The jurisdiction of the district court existed pursuant to Rule 7 of the General Rules of that court, which rule was duly enacted pursuant to Article III, Section 1 of the Constitution of the United States, 28 U.S.C. §2071 and Rule 83 F.R.C.P.

Question Presented

Where an attorney has been disciplined by a state court for professional misconduct on the basis of an evidentiary record not developed in that court and a United States District Court thereafter seeks to discipline that attorney on the basis of the identical record:

(a) to what extent, if any, is the district court bound by the state court's determination of the appropriate quantum of discipline to be imposed; and

(b) to what extent, if any, is the district court bound by the state court's analysis of the legal or factual issues involved?

Constitutional Provision, Statute and Rules Involved

Article III, Section 1 of the Constitution of the United States, provides as follows:

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts, as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2071 of Title 28, United States Code, provides as follows:

> § 2071. Rule-making power generally
>
> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 102, 63 Stat. 104.

Rule 83 of the Federal Rules of Civil Procedure provides as follows:

> Rule 83. Rules by District Courts
>
> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of the rules and amend-

ments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Rule 7 of the General Rules of the United States District Court for the District of New Jersey, provides as follows:

RULE 7 DISCIPLINE OF ATTORNEYS

(1) The chief judge shall have charge of all matters relating to the discipline of members of the bar.

(2) The court may make an order in a disciplinary proceeding disbarring, suspending or censuring, or taking such other action as justice may require, with respect to a member of the bar of this court:

(a) Who has resigned from the bar of a court of any State, Territory, District, Commonwealth or Possession;

(b) Who has been disbarred, suspended from practice or censured in any State, Territory, District, Commonwealth or Possession;

(c) Who has been convicted of a crime involving moral turpitude in any State, Territory, District, Commonwealth or Possession; or

(d) Who is guilty of conduct unbecoming a member of the Bar of this court. Without limiting the generality of the foregoing, such misconduct shall be deemed to include fraud,

deceit, malpractice, conduct prejudicial to the administration of justice or violation of the Code of Professional Responsibility of the American Bar Association.

GENERAL RULES

(3) Proceedings within subdivisions (a), (b), and (c) of Paragraph 2 may be initiated by an order requiring the respondents to show cause within 30 days after service thereof on him, personally or by mail, why he should not be disciplined. Upon the issuance of such order the chief judge may, for good cause, temporarily suspend the respondent pending the termination of the proceedings. Upon the return of said order, if the respondent fails to appear or, if he appears and does not contest, the court shall take such action as justice may require. If the respondent appears and contests, the chief judge shall prescribe procedures to formulate the issues and to provide for a hearing in a manner similar to that set forth in Paragraph 4 hereof.

(4) Proceedings within subdivision (d) of Paragraph 2 shall be presented to the chief judge, and, if he deems the charges of professional misconduct of sufficient weight, he shall refer them for preliminary investigation and recommendation to a committee of members of the bar of the court designated by him or to the United States Attorney. The recommendation shall be presented to the chief judge.

Thereupon, with the approval of the chief judge, the committee designated or the United States Attorney shall proceed against the defendant by a petition setting forth the charges against him and an

order requiring him to file an answer and show cause within 30 days after service on him, personally or by mail, of the petition and order why he should not be disciplined. Upon respondent's answer to the petition, the chief judge may set the matter for prompt hearing before himself, or a court of one or more judges, or may appoint a master to hear and report his findings and recommendations. After such a hearing or report, or if no answer is made by the respondent, the court shall take such action as justice may require.

(5) The court, with the consent of the respondent, may order a disciplinary hearing to be private and direct the papers to be sealed and impounded.

(6) Whenever it appears that an attorney at law admitted to practice in this court is suspended, disbarred, or disciplined in this court, the clerk shall transmit to the Supreme Court of New Jersey and the United States Court of Appeals for the Third Circuit a certified copy of the order of suspension, disbarment or discipline.

(7) A visiting attorney permitted to argue or try a particular cause in accordance with Rule 4(c) who is found guilty of professional misconduct may be precluded from again appearing at the bar of this court. Upon the entry of an order of preclusion, the clerk shall transmit to the Supreme Court of New Jersey and the United States Court of Appeals for the Third Circuit a certified copy thereof, and of the court's opinion.

Statement

Respondent, a New Jersey attorney,[1] was disbarred until further order of the court by the United States District Court for the District of New Jersey of December 10, 1974 (App. D, pp. 39-50a). The proceeding was initiated by an order issued pursuant to Rule 7 of the General Rules of the court directing respondent to show cause before a three-judge panel why he should not be disciplined.

Prior to the issuance of that order, respondent had been suspended for one year from the practice of law by the New Jersey Supreme Court for having knowingly assisted his client in the making of a $20,000 illegal payment to a public official of Jersey City (App. E, pp. 53-61a). The discipline which had been imposed by the New Jersey Supreme Court was based on that court's assessment of a record which had been developed by the Essex County Ethics Committee.[2]

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[1] Respondent is also a member of the bar of this court.

[2] The State of New Jersey conducts attorney disciplinary proceedings through county ethics committees. The ethics committees are charged by law with conducting preliminary investigations and, where warranted, further formal proceedings. A formal proceeding is commenced by the filing of charges. Thereafter, the attorney is required to file an answer. If necessary, a hearing is held at which testimony and other evidence is received. If unprofessional conduct is found, a presentment containing a summary of the matter and the committee's findings of fact is transmitted to the New Jersey Supreme Court for ultimate disposition. The Supreme Court conducts no further hearings and the ethics committees do not make recommendations as to the nature or quantum of discipline to be imposed. New Jersey Court Rules, R1:-20-1 to 1:20-5. That procedure was followed in this case and there is no claim that the state proceedings were defective in any respect.

That entire record, which consisted of certain testimony given under immunity by respondent and his client before the New Jersey State Commission of Investigation, formal charges filed by the Ethics Committee and respondent's answer thereto, respondent's testimony and that of two character witnesses before the committee, affidavits submitted by respondent and counsel to the committee and the committee's presentment and supplemental report, was before the district court (CA, pp. 412-14a).[3]

Respondent appeared personally with counsel before the three-judge panel on two occasions. On both occasions, the court questioned counsel as to matters appearing in the state record and offered respondent the opportunity to supplement the record in any respect. Respondent, though conceding that the district court was not bound by the decision of the New Jersey Supreme Court as to the sanction which could be imposed, elected not to supplement the record (CA, pp. 375-76a, 378a, 412-14a, 405a). At the conclusion of the proceeding, respondent was advised that the matter would be referred to the entire court for disposition (CA, p. 416a).

Seven members of the court were of the view that, while a suspension, disbarment or censure of an attorney by the New Jersey Supreme Court would ordinarily result in corresponding action in the district court, the district court had an independent obligation to make its own rational analysis and determination of the discipline to be imposed in each case and that the discharge of that obligation in respondent's case required disbarment (App.

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[3] That record, minus copies of the exhibits appended to the Presentment of the Ethics Committee, is included in the appendix filed in the court of appeals. The designation "CA" as used in this petition refers to that appendix.

D, pp. 39-42a). Two members of the court, although agreeing that the court had the power to disbar respondent, dissented from the exercise of that power on the ground that policy considerations dictated that the district court impose a discipline identical to that imposed by the New Jersey Supreme Court unless there existed a grave reason for not doing so (App. D, pp. 43-50a).

1. To illuminate the disagreement between the district court and the New Jersey Supreme Court and, thus, properly to frame the issues considered by the court of appeals, it is necessary briefly to summarize the facts underlying the finding of professional misconduct (see also App. A, pp. 3-10a; App. D, 39-40a; App. E, pp. 53-59a). In 1967, respondent became aware through Clinton B. Snyder, a local real estate broker, of the impending sale of Jersey City waterfront property. Respondent communicated this information to his client, Ezra Sensibar, president of Construction Aggregates Corporation, a firm which specialized in the construction and operation of port facilities. Thereafter, respondent, Snyder and Sensibar formed the Port Jersey Corporation to bid on the waterfront property. The respective ownership interests in Port Jersey were: Construction Aggregates Corporation 60%, Snyder 20% and respondent 20%. On August 1, 1967, the waterfront property was auctioned and Port Jersey was the successful bidder, having bid $2,040,000 (CA, pp. 33-35a).

The waterfront property was essentially a swamp. In addition, it was isolated from city services, such as water and sewerage, and could not be easily reached due to the lack of access roads. In order to develop the property as a port facility, it was necessary in the judgment of the principals of Port Jersey to secure cooperation from the City of Jersey City in the form of construction

of access roads, laying of water and sewerage lines to the property and the providing of favorable tax treatment (CA, pp. 42-45a, 53-54a, 68-69a). At the time Port Jersey successfully bid on the property, the City of Jersey City had not announced that it was committing itself to furnish any such cooperation (CA, pp. 40a, 114a).

Shortly after the successful bid, Sensibar arranged a meeting with John V. Kenny, who, though he held no office was regarded as the *de facto* political leader in Jersey City. At that meeting Sensibar told Kenny that Port Jersey would need many forms of cooperation from the City of Jersey City in order to make the development of the port facility possible. Kenny agreed to furnish the cooperation requested and told Sensibar that if anybody asked for money, he, Sensibar, should come to him, Kenny, and he would take care of it. After being assured of cooperation, Sensibar asked Kenny whether there were any local people who should be taken into the venture. Kenny responded that he would appreciate Port Jersey's employing Comparetto & Kenny as its architect. Respondent was out of town at the time of the meeting but was subsequently advised by Sensibar and Snyder as to what had transpired (CA, pp. 36-37a).

Port Jersey thereafter decided to retain Comparetto & Kenny as its architects because of Kenny's suggestion and because they were "well regarded, well connected locally". Respondent negotiated the contractual terms and drafted the contract, which was entered into in December 1967 (CA, pp. 39-40a, 114-16a).

In March 1968, respondent and Sensibar met with Mayor Whelan and City Council President Flaherty at a party in New York City and respondent explained to those officials the various forms of cooperation which Port Jersey would require. No commitment was made by

officials. Thereafter, respondent negotiated a contract with the city of Jersey City in which the city agreed to construct the necessary access roads and to lay water and sewerage lines to the property (CA, pp. 41-44a).

Title to the property passed in November 1968. Following the closing of title, the city council adopted various resolutions providing for the access roads and water and sewerage lines. The city council also adopted a resolution authorizing the payment of a 5% brokerage commission to the C. B. Snyder Realty Company, a firm in which Snyder had a one-third interest. No provision had been made for the payment of the commission, which amounted to $102,000, either in the bid specifications, announced when the property was auctioned, or in the closing documents which were executed when title passed (CA, pp. 47a, 139a, 140-141a, 143a).

Upon receipt of the $102,000 in January 1969, Snyder paid respondent half, pursuant to an oral arrangement. Respondent deposited the $51,000 he received in a special account, denominated the Arthur Lawrence Abrams Trust Account. This money was ultimately utilized to make an illegal $20,000 payment to the president of the Jersey City council, Flaherty (CA, pp. 47-51a).

Later that month or in the early part of the following month, respondent attended a luncheon with Snyder and Bernard Kenny in Newark. At that time, Kenny stated that the "organization", which respondent understood to mean the Hudson County Democratic Organization, wanted a percentage of the construction costs of the port facility in cash. Kenny did not threaten but did indicate that, in the absence of payment, Port Jersey would experience difficulties. Respondent did not discuss the matter further (CA, pp. 51-55a).

Respondent then informed Sensibar of what had happened. Sensibar thereafter met with Flaherty to discuss complaints he had received from Port Jersey personnel about a lack of cooperation from the city. Sensibar mentioned his original discussion with John V. Kenny. Flaherty replied that he knew about that discussion and told Sensibar that the organization needed money. He suggested that Port Jersey contribute 3% of the cost of construction. Sensibar refused and the meeting ended (CA, pp. 117-18a).

A couple of weeks later, Sensibar met with John V. Kenny. He told Kenny of Flaherty's demand and reminded him of their earlier discussion. Kenny responded by telling Sensibar that he remembered the discussion and would stand by it but that a campaign contribution would be appreciated because the organization had an expensive campaign. Sensibar did not respond and the meeting ended. Sensibar returned to Chicago "with the intention that we would not make any substantial contribution" (CA, pp. 119-20a).

In early April, respondent, Snyder and Bernard Kenny told Sensibar they were stymied at city hall and suggested to him that he have another meeting with Flaherty. A meeting was held in Flaherty's office on April 19. At that meeting, Flaherty stated that he needed $140,000 to finance the balance of the campaign and that he had to go to a few large contributors to get the money. He also stated that the proposal he had made earlier was unrealistic and he was now willing to accept 1% of construction costs as a contribution. Sensibar offered a contribution of $10,000 and, after further discussion, agreed to the making of a $20,000 contribution (CA, pp. 120-23a).

After the meeting, Sensibar consulted with respondent and Snyder who both told him "that it was unrealistic to expect that we could do as much construction work, as much business as we were doing in Hudson County without acceding to a shakedown of some kind. They [respondent and Snyder] thought that $20,000 in the circumstances might be nominal and they urged that I should arrange for us to pay it" (CA, pp. 124a).

Thereafter, respondent issued a $20,000 check on the Arthur Lawrence Abrams Trust Account at Sensibar's request for the purpose of enabling Sensibar to obtain the $20,000 in cash he had agreed to pay to Flaherty (CA, pp. 58-59a, 161-63a). At Sensibar's instruction, respondent falsely represented on the face of the check that it was issued in payment "For Engineering Services". Thereafter, Sensibar sent respondent a false invoice reflecting a $20,000 charge for engineering services (CA, pp. 311-13a). Sensibar cashed the check and delivered the cash to Snyder, who in turn delivered it to Flaherty (CA, p. 125a). Afterwards, Port Jersey received cooperation from the City in regards to sewerage, water, access roads and favorable tax treatment (CA, pp. 125-26a).

2. On the foregoing facts, the district court differed with the New Jersey Supreme Court as to the quantum of discipline to be imposed because it disagreed that the facts presented mitigating circumstances. Both courts had previously disbarred an attorney, Colsey, who had assisted his client in making an extortionate payment to a public official and, in respondent's case, disagreed as to whether there existed a sufficient distinction between the misconduct in the two cases. As the New Jersey Supreme Court viewed the matter:

> In *Colsey* an attorney was disbarred for knowingly participating in a transaction which involved a corrupt payment to satisfy an illegal demand by a public official. However, unlike the situation here, the attorney was not in any sense a co-victim, played a very active part in the corrupt transaction itself and used the fact that he was a member of the bar as part of the mask for the crime by creating the appearance that a professional fee was involved. 63 N.J. at 215, 306 A.2d at 75. We agree with the position of respondent's counsel that Colsey is distinguishable and that disbarment is not called for. (App. E, p. 60a).

In disagreeing, the district court stated:

> We see no basis for distinguishing this case from In re Colsey, 63 N.J. 210 (1973). Professional misconduct, like fraud, takes many forms. Variations in detail are not significant when the underlying character is the same. A lawyer who countenances and assists client misconduct for the payment of an extortionate bribe countenances two offenses: one, the extortion and two, the bribe. His minimum duty in such circumstances is to advise the client against it in the strongest terms, and if the client persists, to disassociate himself from the matter promptly and completely. And, since a communication in the course of legal service sought in aid of the commission of a crime or fraud is not privileged, N.J. Ev. Rule 26 (2) (a), he may be under a further duty to report the matter to proper authorities. (App. D, p. 40a).

As will be discussed in greater detail below, the four judges comprising the majority in the court of appeals

held that the district court was not permitted to disagree but was required to accept the distinctions made by the New Jersey Supreme Court.

In addition to disagreeing that respondent's variation of participation in the making of an illegal payment to a public official was significant for disciplinary purposes, the district court made two observations concerning the record which reflected a somewhat different approach than that taken by the New Jersey Supreme Court.

The first of these related to respondent's 20% ownership interest in the Port Jersey Corporation, a fact which was undisputed from the outset of the state proceedings and which was at all times relied upon by respondent in attempting to justify his participation in the making of the illegal $20,000 payment. The district court was of the view that "[t]he acquisition of an interest in the client's enterprise was obviously a factor that interfered with the exercise of free judgment on behalf of the client." The New Jersey Supreme Court, in distinguishing respondent's case from Colsey's case, referred, as quoted above, to the fact that Colsey "was not in any sense a co-victim", *i.e.*, Colsey had no direct financial interest in his client's enterprise (App. D, p. 40a).

The second observation made by the district court reflecting a different approach was with respect to the $102,000 commission and the subsequent use of respondent's share to make the $20,000 illegal payment. The district court stated:

> Another factor is that Abrams accepted a share of a real estate commission paid by the City of Jersey City on the sale of property on public bid. He deposited that share in his trust account, explaining that he considered it to belong to the

> client, but no credible explanation was provided for the making of the payment in the first place. The commission aspect bears all the indications of a device to divert public funds into channels from which they could be repaid secretly to the public officials. Justification for its payment is not satisfactorily shown. (App. D, p. 40a)

In the state proceeding, the commission was considered in two different contexts. In its initial statement of charges, the Ethics Committee had charged that respondent's participation in sharing the commission and in rebating $30,000 to Port Jersey violated a New Jersey statute which had been repealed prior to the commencement of proceedings (CA, pp. 4-5a). That charge, in the view of the Supreme Court, was apparently abandoned because the Ethics Committee made no reference to it in its supplemental report and, therefore, the court concluded that "the sharing of the brokerage commission" was not before it (App. E, pp. 57a, 58a).

The other context in which the commission was considered was its use to provide the funds from which the illegal $20,000 payment was made. The accusation had been made during the questioning of respondent by the State Commission of Investigation and the Ethics Committee that the payment of the commission, which was a discretionary act by the city council of which Flaherty had been president, was part of a premeditated scheme to provide a fund from which illegal payments could be made (CA, pp. 79a, 201-02a, 226a).[4] In addressing itself to respondent's use of his share to create the trust fund

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[4] Respondent's counsel in respondent's presence was additionally questioned on this point in the district court proceeding (CA, pp. 401-05a).

from which the illegal $20,000 payment was made, the New Jersey Supreme Court made two observations:

(1) The purposes of surrounding the original creation of the trust fund is nowhere unequivocally acknowledged though the Committee in its presentment concluded that the $51,000 retained in respondent's possession in a trust account that contained only Port Jersey money was used by Port Jersey to make irregular payments which would not be reflected upon the corporate books of Port Jersey. (App. E, p. 58a)

(2) Though the original creation of the trust fund itself by the respondent was suspect, the record does not permit a finding that it was specifically designed for the illegal payment. (App. E, p. 60a)

3. On review, the court of appeals unanimously agreed that the district court's order could not stand but could not agree either as to the reason why it could not stand or as to whether the district court was to be permitted to take any subsequent action in the matter. Four separate opinions were filed (App. A, pp. 1-35a).

The majority, consisting of four judges, reversed stating that the principles guiding its decision were three in number:

(1) To recognize and reinforce an absolute and unfettered power of the district court to admit and to discipline members of its bar independently of and separately from admission and disciplinary procedures of (a) the state courts and (b) this court.

(2) To recognize that the absolute and unfettered power of the district court to admit or reject appli-

> cations for admissions will be circumscribed to the extent the district court depends upon the state court system for eligibility requirements. Thus, all other things being equal, if a district court by rule derivatively admits to its bar those admitted to the state bar, the district court may not arbitrarily deny admission to one who is a member in good standing of the state bar.
>
> (3) To recognize that an absolute and unfettered power of the district court to discipline lawyers may be circumscribed to the extent the district court, in imposing its disciplinary sanctions, relies upon a state's legal or factual determinations. Stated otherwise, the district court's action may be circumscribed to the extent it depends in whole or in part on a state's actions, either for the commencement of the disciplinary proceedings or for a stated basis in the determination of the sanction imposed. (App. A, pp. 15-16a)

Applying those principles, the majority concluded that the district court's action did not conform in two respects. First, it concluded that the district court had relied on the state court decision in *Colsey, supra,* for precedential authority, and that, because it did so, it was required to draw the identical distinctions between that case and the present case that were drawn by the New Jersey Supreme Court. As the majority put it:

> Having elected to bottom its own rational analysis on New Jersey law, the controlling case for the district court was *In Re Abrams*—not *In Re Colsey* (App. A, 21a).

Second, it concluded that the observations expressed by the district court with respect both to the commission and to respondent's interest in his client's enterprise were impermissible because they were not consistent with the treatment of those matters by the New Jersey Supreme Court.

As the majority analyzed the issue, the district court's views constituted views on "charges" which either had never been made in the state proceedings (the ownership interest) or which had been abandoned therein (the commission). Reasoning from this premise, the majority proceeded to analyze the district court disciplinary rule and concluded that the district court had violated its rule by not having provided respondent with formal notice of those "charges" prior to imposing discipline (App. A, pp. 22-26a).

One judge who joined in that opinion filed a separate opinion expressing the view that the principles established by this Court in *Selling* v. *Radford*, 243 U.S. 46 and *Theard* v. *United States*, 354 U.S. 278 required the district court in respondent's case to impose the identical discipline imposed by the New Jersey Supreme Court (App. A, pp. 26-29a).

Three judges dissented from the reversal. They agreed with the majority that it was impermissible for the district court to have considered the commission and respondent's ownership interest without having put respondent on notice prior to the commencement of the proceeding that it would do so. Their analysis differed from the majority's in that they relied on due process notice grounds rather than upon an analysis of the district court rule to reach their result. Unlike the majority, however,

they deemed it appropriate to remand the case to allow the district court a further opportunity to reach its judgment regarding the extent of the discipline, based on the "issue" derived from the state proceeding, or else to seek to have additional charges filed in accordance with Rule 7 (App. A, pp. 30-34a).

One judge who joined in that opinion filed a separate opinion in which he expressed the view that he found this case to be "an exceedingly close case as to whether affirmance is required on this record" (App. A, pp. 34-35a).

Reasons for Granting the Writ

This case presents issues of first impression in this Court which are of fundamental importance to the public, the legal profession and the federal courts. At a time when the problems of attorney discipline are receiving more widespread and searching attention by the profession and by the public, it is imperative that this court provide authoritative guidance as to how the federal courts can best deal with those issues.

In concluding *en banc* that it was impermissible for the district court to disagree with a state court determination as to the discipline to be imposed upon an attorney who was clearly proven to have been guilty of serious misconduct, the court of appeals has forged a precedent inconsistent both with prior precedent in this court as to the extent of a federal court's disciplinary powers and with the disciplinary practice followed in this court pursuant to Rule 8. Moreover, by disagreeing not only as to the basis for its unprecedented action but also as to whether the district court may proceed further in this matter, the court of appeals has created great uncertainty

as to the action a federal court should take when a member of its bar has been disciplined by a state court.[5]

1. This court has consistently held that a federal court has the power both to prescribe requirements for admission to practice before that court and to discipline attorneys so admitted and this power has consistently been recognized by the court to be very broad. *Ex parte Burr*, 22 U.S. (9 Wheat.) 529; *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13; *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-79; *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 512; *Theard* v. *United States*, *supra* at 281; *In re Ruffalo*, 390 U.S. 544, 547.

This court has also consistently held that review of the exercise of this broad power is confined within the exceedingly narrow limits of clear abuse of discretion. *Ex parte Burr*, *supra* at 529; *Ex parte Secombe*, *supra* at 15; *Ex parte Wall*, 107 U.S. 265, 272; *Theard* v. *United States*, *supra* at 281. In the seminal case on the questions of a federal court's power to discipline attorneys and a reviewing court's power to interpose its judgment as to the exercise of that power, Chief Justice Marshall explained that in disciplinary matters:

> [D]iscretion ought to be exercised with great modera[illegible] and judgme[illegible] but it must be exercised;

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[5] This case should be contrasted with the recent disciplinary action of the Court of Appeals for the District of Columbia circuit. That court suspended former Attorney General Kleindienst for one month after the Supreme Court of Arizona had chosen the lesser discipline of censure and after the District Court for the District of Columbia had concluded that no discipline at all was warranted. *In the Matter of Richard G. Kleindienst*, No. 5-37-75, filed August 11, 1975 (a copy of the as yet unpublished memorandum order is being served on counsel for respondent along with this petition). The charged misconduct in each instance was identical.

> and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.
>
> Some doubts are felt in this court respecting the extent of its authority as to the conduct of the circuit and district courts towards their officers; but without deciding on this question, the court is not inclined to interpose, unless it were in a case where the conduct of the Circuit or District Court was irregular, or was flagrantly improper. *Ex parte Burr, supra* at 529.

This court has never held that a federal court is bound by a state determination as to the discipline to be imposed. Beginning with *Selling* v. *Radford, supra,* this court has been confronted on five occasions with the question of whether either this court or a lower federal court should disbar an attorney who had been disbarred by a state court.[6] *In re Isserman,* 345 U.S. 286; *In re Isserman,* 348 U.S. 1; *Theard* v. *United Sates, supra; In re Ruffalo, supra.*

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[6] That the question has arisen in this form in probably due to the fact that traditionally federal courts have, with few exceptions, tended to rely on the state courts to conduct disciplinary proceedings and to make disciplinary determinations. Once made by a state court, those determinations have been generally accepted without more by a federal court as a basis for imposing the identical discipline in the federal court. See generally Agata, Admissions and Discipline of Attorneys in Federal District Court: A Study and Proposed Rules, 3 Hofstra L.Rev. 249 *et seq.* (Spring 1975).

In *Selling,* it was contended that simply because the state court had disbarred, this court was required to do so. This court's response was it "should recognize the absence of fair private and professional character inherently arising as the result of [the state disbarment] so far as we are at liberty to do so consistently with the duty resting upon us to determine for ourselves the right to continue to be a member of this Bar", 243 U.S. at 50. This court went on to state that it would disbar in such a case:

> unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1, that the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do. *Id.* at 50-51.

In applying that precedent to the disciplinary actions of lower federal courts, this court has twice reversed disbarment orders which were based on state judgments, holding on both occasions that the lower federal court could not, consistently with its independent obligation to determine for itself whether discipline should be imposed, accept the state judgment in the matter. *Theard* v. *United States, supra; In re Ruffalo, supra.*

In the *Isserman* cases, this court successively split four to four and three to three on the question of whether it should disbar an attorney who had been disbarred by a state court following the affirmance by this court of his conviction for contempt committed during a trial (*Sacher* v. *United States*, 343 U.S. 1). The disagreement in both cases centered primarily on the question of whether simple contempt constituted an adequate basis for disbarment.[7]

From the foregoing discussion, it is, therefore, clear that unbroken precedent in this court required the district court to make its own independent determination of the appropriate discipline to be imposed on respondent and required the court of appeals not to interfere with that determination unless it found a clear abuse of discretion.

2. Reported precedent aside, the disciplinary practice of this court in recent years supports the district court's action in this case. This court does not, in imposing discipline on members of its bar, accept the proposition that it is required to impose the identical quantum of discipline which has been imposed by a state court. Attorneys who have been suspended for misconduct by state courts have regularly been disbarred by this court.[8] *See, e.g., In re Disbarment of Osborne*, 420 U.S. 918 (three year suspension—New York); *In re Disbarment of Buttles*,

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[7] In *Sacher* v. *Association of the Bar*, 347 U.S. 288, this court held that simple contempt involving no moral turpitude did not furnish an adequate basis for a lower federal court to disbar an attorney.

[8] The court of appeals was fully aware of this court's disciplinary practices but apparently concluded that those practices were not relevant to a consideration of the issues before it (App. A, p. 11a).

419 U.S. 1101 (two year suspension—New York); *In re Disbarment of Mades,* 414 U.S. 1154 (two year suspension—Massachusetts); *In re Disbarment of Pavsner,* 409 U.S. 1102 (three year suspension—New York).

3. The action of the court of appeals in this case raises substantial questions requiring this court's review because that action severely limits the exercise of independent federal court determination in disciplinary matters in several critical respects.

First, by holding that the district court was bound by state law and was, thus, required to accept the distinctions which the state court had drawn between two cases, the court of appeals has established within its circuit a novel and significant principle which, if followed, would fundamentally alter the role of the federal courts in disciplinary matters.

Until the court of appeals' decision in this case, no court or commentator had ever accepted the proposition that federal courts are bound in any way to state law in exercising their independent disciplinary powers. *See, e.g.,* Cheatham, The Reach of Federal Action Over The Profession of Law, 18 Stan. L. Rev. 1288, 1291 (1966). None of the cases previously decided by this court support that proposition and petitioner respectfully submits that the proposition is totally inconsistent with the concept of independent determination.

Second, by holding that the district court violated its own disciplinary rule, the court of appeals has significantly enlarged the scope of review of disciplinary determinations and, thus, has correspondingly significantly diminished the independence of federal courts within the circuit in disciplinary matters.

If, as this court has repeatedly held, an exercise of disciplinary power by a federal court is reviewable only

within the exceedingly narrow limits of clear abuse of discretion, the question of whether a lower court correctly applied its rule should never arise because the ultimate question for the reviewing court should be whether the discipline imposed was either clearly improper or was imposed in violation of fundamental rights. To the extent, therefore, that the opinion of the court of appeals can be said to furnish precedent for an expanded scope of review in disciplinary matters, it would, if followed, significantly alter the relationship between district courts and reviewing courts in this highly sensitive area.

Because the two novel holdings discussed above constituted the entire basis upon which the court of appeals reversed the district court's disciplinary determination, the necessity for review by this court is clear.

The alternative analysis employed in the concurring and dissenting opinion, in which three judges joined raises an equally substantial question requiring this court's review because that analysis is also, in petitioner's view, inconsistent with prior precedent of this court.

The three judges who dissented from the reversal were in agreement with the majority that it was improper for the district court to treat two matters in the common evidentiary record differently than they had been treated by the New Jersey Supreme Court, but were not in agreement that the basis for this conclusion was either that the district court was required to follow state law or that it had violated its disciplinary rule.[9]

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[9] No view was expressed in this opinion as to the majority's conclusion that the district court was bound by state law. As to the conclusion that the district court violated its rule, however, the view taken was that it was an inappropriate basis for decision because (1) the district court's actions suggested that it believed its rules had been implemented by the procedures followed, (2) the interpretation of local rules is primarily committed to the courts which promulgated them, and (3) the meaning of the rule in the procedural context that developed was uncertain (App. A, p. 32a).

They based their conclusion on the due process ground of lack of adequate notice of the charges upon which discipline was imposed. This court has held in *In re Ruffalo, supra,* that, where a federal court disbars an attorney on the basis of a state record, the federal disbarment suffers from any due process infirmity in the state proceeding. The infirmity found in *Ruffalo* was that an entirely new charge was formally lodged against an attorney after he had both filed his answer to the original charges and had testified and provided other evidence. The new charge ultimately furnished the entire basis for the federal disbarment.

Ruffalo is clearly distinguishable from the case at bar for four reasons. First, no due process infirmity was either claimed or found to have existed in the state proceeding. Second, no new charge was ever filed against respondent. Third, the two matters treated differently by the district court were matters which were not only considered relevant to an original charge by the Ethics Committee, by the New Jersey Supreme Court, and by the district court but were matters as to which respondent had been questioned by the State Commission of Investigation, the Ethics Committee, and the district court (See pp. 15-17, *supra*). Fourth, a reviewing court could hardly conclude that the additional matters considered by the district court constituted the entire or, indeed, any substantial basis for the discipline imposed.

By construing *Ruffalo,* therefore, to require remand in this case, the concurring and dissenting judges have created a precedent which, if followed, would require a federal court either to accept a state court's factual analysis or run the risk of having a reviewing court conclude that its disagreement with that analysis constituted, for due process purposes, the filing of new charges. Such a

result is not consistent with the principle that a federal court must make its own independent determination of the disciplinary action to be taken.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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SEPTEMBER 1975

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1029

IN THE MATTER OF:

ARTHUR LAWRENCE ABRAMS,
An attorney-at-law

Arthur Lawrence Abrams,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

(D.C. Misc. No. 74-53)

Argued May 8, 1975

Before: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, ROSENN, HUNTER and WEIS, *Circuit Judges*.

OPINION OF THE COURT

(Filed—June 30, 1975)

Appendix A

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ALDISERT, *Circuit Judge.*

Arthur Lawrence Abrams appeals from an order of the United States District Court for the District of New

Jersey disbarring him from the practice of law in that court. The circumstances giving rise to this litigation relate to Abrams' issuance of a check, drawn on a trust account and ultimately used to satisfy the extortion of Jersey City officials. The Supreme Court of New Jersey ordered his suspension from the practice of law for one year. *In re Abrams,* 65 N.J. 172, 320 A.2d 471 (1974). Acting on the same evidentiary material, and without conducting a separate evidentiary hearing, the district court entered its order.[1] The question presented for review is the propriety of the district court's action.

I.

Although the facts relevant to the charge against Abrams are not in dispute, we will accept the statement of facts presented in the United States Attorney's brief defending the action of the district court:

> The order appealed from had its genesis in an investigation conducted by the New Jersey State Commission of Investigation ("SCI"). In August 1971,

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ORDER

For the reasons stated, it is hereby ordered that the name of Arthur Lawrence Abrams be, and the same hereby is, stricken from the roll of attorneys permitted to practice before this Court, and until the further order of the Court.

In re Abrams, 385 F. Supp. 1210, 1212 (D.N.J. 1974). Although the last clause renders the order susceptible to the interpretation that the court ordered something less than a final disbarment, the parties have treated this case as one of disbarment. Accordingly, we also will treat the order as a disbarment.

appellant, Arthur Lawrence Abrams, and his client Ezra Sensibar refused, on the basis of the Fifth Amendment, to answer certain questions propounded by the SCI. Thereafter, formal immunity was conferred upon them and their subsequent public testimony in October 1971 formed the predicate for the filing of formal charges against Abrams by the Essex County Ethics Committee. At Abrams' specific request, his testimony and that of Sensibar was made part of the record of the ensuing disciplinary proceeding. Although several charges were initially filed against Abrams, only one charge is now relevant. That charge was as follows:

> On April 22, 1969, by check bearing that date drawn on his trust account in the National Newark and Essex Bank, in Newark, respondent did pay to Construction Aggregates Corporation the sum of $20,000 allegedly for engineering services which sum respondent well knew would be used by said corporation, or an officer thereof, for an illegal and improper purpose contrary to and in violation of N.J.S. 2A:93-6 as a bribe to and to satisfy the extortionate demands of certain public officials of the City of Jersey City.

The facts relevant to that charge are set forth below.

In 1967, appellant became aware through Clinton B. Snyder, a Jersey City real estate broker, of the impending sale of Jersey City waterfront property. Appellant communicated this information to Ezra Sensibar, president of Construction Aggregates Corporation, a firm which specialized in the construction and operation of port facilities. Thereafter, appellant, Snyder and Sensibar formed the

Appendix A

E.S.C.A. Corporation (later renamed the Port Jersey Corporation and hereinafter referred to as "Port Jersey") to bid on the Jersey City waterfront property. The respective ownership interests in Port Jersey were: Construction Aggregates Corporation 60%, Snyder 20% and appellant 20%. On August 1, 1967, the waterfront property was auctioned and Port Jersey was the successful bidder, having bid $2,040,000.

The waterfront property was essentially a swamp. In addition, it was isolated from city services, such as water and sewerage, and could not be easily reached due to the lack of access roads. In order to develop the property as a port facility, it was necessary in the judgment of the principals of Port Jersey to secure cooperation from the City of Jersey City in the form of construction of access roads and water and sewerage lines to the property and the providing of favorable tax treatment. At the time Port Jersey successfully bid on the property, the City of Jersey City had not announced that it was committing itself to furnish the various forms of cooperation Abrams and his co-venturers deemed essential.

Shortly after the auction, a meeting was arranged by Sensibar to obtain the necessary cooperation. The meeting was held at the offices of Comparetto and Kenny, a local architectural and engineering firm, and was attended by John V. Kenny [*de facto* political leader of Hudson County], Sensibar and Snyder. At the meeting, Sensibar told John V. Kenny that Port Jersey would need many forms of cooperation from the City of Jersey City in order to make the development of the port facility

possible. Kenny agreed to furnish the cooperation requested and told Sensibar that, if anybody asked him for money, he, Sensibar, should come to him, Kenny, and he would take care of it. After being assured of cooperation, Sensibar asked Kenny whether there were any local people who should be taken into the venture. Kenny responded that he would appreciate Port Jersey's employing Comparetto and Kenny as its architect. Abrams was out of town at the time of the meeting but was subsequently advised by Sensibar and Snyder as to what had transpired at the meeting.

Port Jersey thereafter decided to retain Comparetto and Kenny as its architects because of John V. Kenny's suggestion and because they were "well regarded, well connected locally." Abrams negotiated the contractual terms and drafted the contract, which was entered into in December 1967.

In March of 1968, Abrams and Sensibar met with Mayor Whelan and City Council President Flaherty at a party at the New York Athletic Club and Abrams explained to these officials the various forms of cooperation which Port Jersey would require. No commitment was made at that time to furnish the cooperation requested. Thereafter, Abrams negotiated a contract with the City of Jersey City in which the City agreed to construct the necessary access roads and to lay water and sewerage lines to the property.

Title to the property did not pass until November 21, 1968. During the period intervening between the successful bid and the closing on the property, appellant, in addition to the negotiations described

above had negotiated certain purchases of adjoining properties in order to resolve potential title problems and had also negotiated a $6,000,000 development loan.

Following the closing of title, the city council of Jersey City adopted various resolutions providing for the furnishing of the access roads, water and sewerage lines. In addition, the city council adopted a resolution authorizing the payment of a 5% brokerage commission to the C.B. Snyder Realty Company, a firm in which Snyder had a one-third interest. No provision had been made for the payment of the commission, which amounted to $102,000, either in the bid specifications, announced when the property was auctioned, or in the closing documents which were executed when title passed.

Upon receipt of the $102,000 in January 1969, Snyder paid Abrams half, pursuant to an oral arrangement entered into between them at some earlier date. Abrams deposited the $51,000 he received in a special account, denominated the Arthur Lawrence Abrams Trust Account. This money remained in the trust account for more than two years and was ultimately utilized in part to make a $20,000 payment to the president of the Jersey City council.[2]

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[2] Of this transaction, the state court noted:

> The respondent testified that although the $51,000 was his to do with as he pleased, he considered that he should ethically turn it over to ESCA [Port Jersey]. He did that by placing it in an "Arthur Lawrence Abrams Trust Account" in the National Newark and Essex Bank; at one point he described the $51,000 in the trust account as "an emergency fund."

65 N.J. at 173, 320 A.2d at 472.

Appendix A

In late January or early February 1969, Abrams attended a luncheon with Snyder and Bernard Kenny at the Downtown Club in Newark. At that time, Kenny stated that the "organization", which appellant took to mean the Hudson County Democratic Organization, wanted a percentage of the construction costs of the port facility in cash. At that time, the estimated cost of construction of the projected port facility was somewhere between fifty and one hundred million dollars. When this demand was made, Abrams didn't think it was necessary to ask Kenny any details nor did Kenny think it was necessary to tell appellant any details. Kenny did not threaten but did indicate that, in the absence of payment, Port Jersey would experience difficulties. Abrams did not argue with Kenny or discuss the matter further with him.

Following the meeting, Abrams telephoned Sensibar in Chicago and was told by Sensibar that he, Sensibar, would take care of it. Thereafter, Sensibar met with Flaherty in New York. He told Flaherty that he was getting complaints about a lack of cooperation and reminded Flaherty of his, Sensibar's, original discussion with John V. Kenny and the promise of cooperation. Flaherty said that he knew about that discussion but that the organization needed money. He suggested to Sensibar that Port Jersey contribute 3% of the cost of construction. Sensibar refused and the meeting ended.

A couple of weeks later, Sensibar arranged a meeting with John V. Kenny. He told Kenny of Flaherty's demand and reminded him of their earlier discussion. Kenny responded by telling Sensi-

bar that he remembered the discussion and would stand by it but that a campaign contribution would be appreciated because the organization had an expensive campaign. Sensibar did not respond and the meeting ended. Sensibar returned to Chicago "with the intention that we would not make any substantial contribution".

In early April, Abrams, Snyder and Bernard Kenny told Sensibar they were stymied at city hall and suggested that he, Sensibar, have another meeting with Flaherty. A meeting was held in Flaherty's office on April 19 between Sensibar and Flaherty. At that meeting, Flaherty told Sensibar that he, Flaherty, needed $140,000 to finance the balance of the campaign and that he had to go to a few large contributors to get the money. He also told Sensibar that the proposal he, Flaherty, had made before was unrealistic and he was now willing to come down to 1% of construction costs as a contribution. Sensibar offered a contribution of $10,000, and, after discussion, Sensibar and Flaherty agreed to the making of a $20,000 contribution.

After this meeting with Flaherty, Sensibar consulted with Abrams and Snyder, who both told him "that it was unrealistic to expect that we could do as much construction work, as much business as we were doing in Hudson County without acceding to a shakedown of some kind. They [Abrams and Snyder] thought that $20,000 in the circumstances might be nominal and they urged that I should arrange for us to pay it".

Thereafter, Abrams issued a $20,000 check on the Arthur Lawrence Abrams Trust Account at Sensi-

> bar's request for the purpose of enabling Sensibar to obtain the $20,000 in cash he had agreed to pay to Flaherty. At Sensibar's instruction, Abrams falsely represented on the face of the check that it was issued in payment "For Engineering Services". Thereafter, Sensibar sent Abrams a false invoice reflecting a $20,000 charge for engineering services. Sensibar cashed the check and delivered the cash to Snyder, who in turn delivered it to Flaherty. Afterwards, Port Jersey received cooperation from the City in regards to sewerage, water, access roads and favorable tax treatment.

U.S. Attorney's Brief at 4-9 (footnotes and appendix references omitted).

In 1973, the Essex County Ethics Committee charged Abrams with various ethical violations stemming from his activities for Port Jersey. In reviewing those charges, however, the New Jersey Supreme Court concerned itself only with Abrams' "knowing participation in the $20,000 payment to the Jersey City officials." *In re Abrams, supra,* 65 N.J. at 177, 320 A.2d at 474. After detailing the factual circumstances which spawned the allegations of impropriety, the state court stated:

> We are concerned with the respondent, a member of the bar who, apart from his financial interest in the venture, was acting as legal counsel and was bound by the high ethical principles of his profession. Those principles clearly dictated that he play no part whatever in the corrupt $20,000 payment to the public officials of Jersey City. We are entirely satisfied that respondent's participation in the corrupt payment . . . was unethical and calls for some measure of discipline.

> . . . We agree with the position of respondent's counsel that . . . disbarment is not called for. But we disagree that "discipline which exceeds reprimand" would be excessive. . . .
>
> The determination as to the measure of discipline is difficult and, as we have repeatedly pointed out, "each case must rest largely upon its own particular circumstances." . . . We have concluded that the respondent's professional dereliction warrants suspension from the practice of law for a period of one year and until further order; judgment to that effect will be entered.

Ibid. at 178-79, 320 A.2d at 474-75.

II.

Preliminarily we emphasize that which is before us and that which is not. We are not to decide Abrams' right to practice in this court. We are not in the position of the United States Supreme Court reviewing a disciplinary action imposed by a state court or determining one's right to continue to practice in that Court. We are to decide if reversible error was committed when the district court, under the circumstances of this case, barred Abrams from practicing in that court after the state court had imposed only a one-year suspension.

We agree totally with the United States Attorney that the starting point for analysis is the unquestioned principle that the District Court of New Jersey, like all federal courts, has the power both to prescribe requirements for admission to practice before that court and to discipline attorneys who have been admitted to practice before that

court. *Ex parte Robinson,* 86 U.S. (19 Wall.) 505, 512 (1873); *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 378-79 (1866); *Ex parte Secombe,* 60 U.S. (19 How.) 9, 13 (1859); *Rodgers* v. *United States Steel Corp.,* 508 F.2d 152, 163 (3d Cir. 1975); *see* U.S. CONST. art. III, §1; 28 U.S.C. §2071; Rule 83, F.R. Civ. P.

From the earliest days of this nation, the power has been recognized as broad. *See In re Ruffalo,* 390 U.S. 544, 547 (1968); *Theard* v. *United States,* 354 U.S. 278, 281 (1957); *Ex parte Secombe, supra,* 60 U.S. at 13; *Ex parte Burr,* 22 U.S. 529 (1824). However, its exercise is not without limits. As Chief Justice Marshall wrote, a balance must be struck:

> On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself.

Ex parte Burr, supra, 22 U.S. at 529-30.

Although a disbarment proceeding is not criminal in nature, it has consequences which remove it from the ordinary run of civil case. *Konigsberg* v. *State Bar,* 353 U.S. 252, 257 (1957); *see Anonymous* v. *Association of the Bar,* — F. 2d —, 17 Crim. L. Rptr. 2083 (2d Cir., Apr. 3, 1975).

"Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland,* 4 Wall. 333, 380; *Spevack* v. *Klein,* 385 U.S. 511, 515." *In re Ruffalo, supra,* 390 U.S. at 550.

In striking the appropriate balance, the district courts must not operate in a vacuum. If the disciplinary proceedings derive from state court action, federal courts are not totally free to ignore the original state proceedings:

> If the accusation rests on disbarment by a state court, such determination of course brings title deeds of high respect. But it is not conclusively binding on the federal courts. The recognition that must be accorded such a state judgment and the extent of the responsibility that remains in the federal judiciary were authoritatively expounded in *Selling* v. *Radford,* 243 U.S. 46. The short of it is that disbarment by federal courts does not automatically flow from disbarment by state courts. Of the conditions that qualify such a state court judgment, the one here relevant is that some "grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do." *Id.,* at 51.

Theard v. *United States, supra,* 354 U.S. at 282.

III.

Our task is one which is "always painful", involving as it does a "proceeding for disbarment of a lawyer."[3]

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[3] *Theard* v. *United States, supra,* 354 U. S. at 279 (Frankfurter, J.).

But it is also more, for the district court's permanent termination of Abrams' right to practice his profession in the New Jersey district court constitutes a substantially more drastic penalty than that first imposed by the state court. Thus, sensitive personal, institutional and societal interests quickly surface and compete with one another.

These separate interests clamor for vindication, and they do so in a jural environment that is fraught with tension and devoid of decisional and precedential guideposts. The United States Attorney suggests that *In re Fleck,* 419 F.2d 1040 (6th Cir. 1969), *cert. denied,* 397 U.S. 1074 (1970), comes close. We disagree and find little guidance from *Fleck.* There the state court suspended the lawyers indefinitely; thereafter the district court disbarred them. We are not at all certain that a substantial difference exists between indefinite suspension and disbarment of a lawyer.[4] Thus, in Roscoe Pound's phrase, the "body of

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[4] This is made abundantly clear in *In re Fleck,* 419 F.2d at 1041, in the appendix setting forth the district court's opinion:

> This matter is before the Court pursuant to an order that respondents show cause why they should not be disbarred from the practice of law in this Court. The respondents were indefinitely suspended from the practice of law in Ohio on December 6, 1961. (Cleveland Bar Association v. Fleck et al., 172 Ohio St. 467, 178 N.E.2d 782.) On June 15, 1962 respondents were suspended forthwith from the practice of law in this Court, and pursuant to Rule 1(E) of the Rules of this Court respondents were ordered to show cause why they should not *also be disbarred from practice in this court.* Rule 1(E) provides in part:
>
> "*Disbarment and Discipline.* Any member of the bar of this court may for good cause shown and after an opportunity has been given him to be heard, be dis-

(Footnote continued on following page)

authoritative materials" relevant to our inquiry gives general, but not specific, guidance. There are no "precepts attaching a definite detailed legal consequence to a definite, detailed state of facts"; at best, we have only some "authoritative starting points for legal reasoning."[5]

Supplied only with "authoritative starting points of legal reasoning" distilled from the Supreme Court teachings, we perceive our role in reviewing the district court's action to be extremely limited:

(1) To recognize and reinforce an absolute and unfettered power of the district court to admit and to discipline members of its bar independently of and separately from admission and disciplinary procedures of (a) the state courts and (b) this court.

(2) To recognize that the absolute and unfettered power of the district court to admit or reject applications for admissions will be circumscribed to the extent the district court depends upon the state court system for eligibility requirements. Thus, all other things being equal, if

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(Footnote continued from preceding page)

barred, *suspended from practice for a definite time,* reprimanded, or subjected to such other discipline as the court may deem proper."

(Emphasis supplied)

It appears that the district court rule contemplated suspension "for a definite time." Because the Ohio state court had "indefinitely suspended" the attorneys, the district court ordered them to show cause "why they should not also be disbarred from practice in this court."

[5] Pound, *Hierarchy of Sources and Forms in Different Systems of Law,* 7 TUL. L. REV. 475, 476, 482, 483 (1933).

a district court by rule derivatively admits to its bar those admitted to the state bar, the district court may not arbitrarily deny admission to one who is a member in good standing of the state bar.

(3) To recognize that an absolute and unfettered power of the district court to discipline lawyers may be circumscribed to the extent the district court, in imposing its disciplinary sanctions, relies upon a state's legal or factual determinations. Stated otherwise, the district court's action may be circumscribed to the extent it depends in whole or in part on a state's actions, either for the commencement of the disciplinary proceedings or for a stated basis in the determination of the sanction imposed.

IV.

We now turn to the application of these guidelines to the case at hand.

Initially, we observe the district court's basis for admitting Abrams to its bar: "Abrams is a member of the bar of this Court by derivative admission on motion, by virtue of his status as an attorney licensed to practice by the Supreme Court of New Jersey. Local Rule 4." 385 F. Supp. at 1212. Thus, the district court has sacrificed some of its total independence of the state court system with respect to its admission procedures.[6]

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[6] Rule 4 of the United States District Court for the District of New Jersey provides in part:

> A. The bar of this court shall consist of those persons heretofore admitted to practice in this court and those who may hereafter be admitted in accordance with these rules.

(Footnote continued on following page)

Appendix A

The majority opinion for the divided district court described the disciplinary proceedings under Local Rule 7.[7]

(*Footnote continued from preceding page*)

B. Any attorney licensed to practice by the Supreme Court of New Jersey may be admitted as an attorney at law on motion of a member of the bar of this court, made in open court, and upon taking the prescribed oath and signing the roll.

C. Any member in good standing of the bar of any court of the United States or of the highest court of any state, who is not eligible for admission to the bar of this court under subdivision B of this rule, may in the discretion of the court, on motion, be permitted to appear and participate in a particular case; provided, however, that such appearances and participation in civil actions, individually or by a law firm of which said attorney is a member or associate, shall be limited to not more than three actions in any calendar year. . . .

7. Rule 7 of the United States District Court for the District of New Jersey provides, in part:

(1) The chief judge shall have charge of all matters relating to the discipline of members of the bar.

(2) The court may make an order in a disciplinary proceeding disbarring, suspending or censuring, or taking such other action as justice may require, with respect to a member of the bar of this court:

(a) Who has resigned from the bar of a court of any State, Territory, District, Commonwealth or Possession.

(b) Who has been disbarred, suspended from practice or censured in any State, Territory, District, Commonwealth or Possession;

(*Footnote continued on following page*)

(Footnote continued from preceding page)

(c) Who has been convicted of a crime involving moral turpitude in any State, Territory, District, Commonwealth or Possession; or

(d) Who is guilty of conduct unbecoming a member of the bar of this court. Without limiting the generality of the foregoing, such misconduct shall be deemed to include fraud, deceit, malpractice, conduct prejudicial to the administration of justice, or violation of the Canons of Professional Ethics of the American Bar Association.

(3) Proceedings within subdivisions (a), (b), and (c) of Paragraph 2 may be initiated by an order requiring the respondent to show cause within 30 days after service thereof on him, personally or by mail, why he should not be disciplined. Upon the issuance of such order the chief judge may, for good cause, temporarily suspend the respondent pending the termination of the proceedings. Upon the return of said order, if the respondent fails to appear or, if he appears and does not contest, the court shall take such action as justice may require. If the respondent appears and contests, the chief judge shall prescribe procedures to formulate the issues and to provide for a hearing in a manner similar to that set forth in Paragraph 4 hereof.

(4) Proceedings within subdivision (d) of Paragraph 2 shall be presented to the chief judge, and, if he deems the charges of professional misconduct of sufficient weight, he shall refer them for preliminary investigation and recommendation to a committee of members of the bar of the court designated by him or to the United States Attorney. The recommendation shall be presented to the chief judge.

Thereupon, with the approval of the chief judge, the committee designated or the United States Attorney shall proceed against the defendant by a petition setting forth the charges against him and an order requiring him to file an answer and show cause within 30 days after service on

(Footnote continued on following page)

In its statement of reasons, the district court acknowledged a responsibility to the New Jersey state court system, implicitly incorporating the statement of "facts and circumstances" set forth in the opinion of the New Jersey Supreme Court. *See* 385 F. Supp. at 1211. Thus, the district court found no adjudicative facts on its own; instead it relied exclusively on those found by the state court. The district court then conceded:

> Ordinarily, a suspension, disbarment or censure by the Supreme Court of New Jersey will result in corresponding action here. Local Rule 7. But this accommodation does not necessarily suffice to discharge the independent obligation of this Court to take appropriate action on its own rational analysis and determination, although in doing so it will hold the greatest respect for, and give due weight and consideration to, the views of the Supreme Court. *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); *In re Wilkes*, 494 F.2d 472, at 474-75 (C.A. 5, 1974).

Ibid. at 1212.

(Footnote continued from preceding page)

him, personally or by mail, of the petition and order why he should not be disciplined. Upon respondent's answer to the petition, the chief judge may set the matter for prompt hearing before himself, or a court of one or more judges, or may appoint a master to hear and report his findings and recommendations. After such a hearing or report, or if no answer is made by the respondent, the court shall take such action as justice may require. . . .

Appendix A

A.

We acknowledge the right of the district court "to discharge [an] independent obligation" and to "take appropriate action on its own rational analysis and determination." We further acknowledge that the "appropriate action" may be at variance with that taken by the state court system. We also acknowledge that the district court may draw inferences from "facts and circumstances" which differ from those drawn by the state. Especially do we believe that the district court may emphasize countervailing federal considerations. *Cf., e.g., Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 537 (1958). But "appropriate action" must always embody a proper application of governing legal precepts. We conclude that the district court's action was deficient in this respect.

For "its own rational analysis and determination" the district court relied in part on a New Jersey Supreme Court decision for precedential authority for its action.

> We see no basis for distinguishing this case from In re Colsey, 63 N.J. 210, 306 A.2d (1973). Professional misconduct, like fraud, takes many forms. Variations in detail are not significant when the underlying character is the same. A lawyer who countenances and assists client misconduct for the payment of an extortionate bribe countenances two offenses: one, the extortion and two, the bribe. His minimum duty in such circumstances is to advise the client against it in the strongest terms, and if the client persists, to disassociate himself from the matter promptly and completely. And, since a communication in the course of legal service sought in aid of the commission of a crime or fraud is not

> privileged, N.J. Ev. Rule 26(2)(a), he may be under a further duty to report the matter to proper authorities.

385 F. Supp. at 1211-12.

In the context of its announced objective to "hold the greatest respect for, and give due weight and consideration to, the views of the [New Jersey] Supreme Court," the district court was not free to rely upon *Colsey* for New Jersey precedential guidance. Having elected to bottom its own rational analysis on New Jersey law, the controlling case for the district court was *In re Abrams*—not *In re Colsey*. And, in *Abrams*, the New Jersey Supreme Court explicitly concluded that *Colsey* was distinguishable:

> In *Colsey* (63 N.J. 210, 306 A.2d 72) an attorney was disbarred for knowingly participating in a transaction which involved a corrupt payment to satisfy an illegal demand by a public official. However, unlike the situation here, the attorney was not in any sense a covictim, played a very active part in the corrupt transaction itself and "used the fact that he was a member of the bar as part of the mask for the crime by creating the appearance that a professional fee was involved." 63 N.J. at 215, 306 A.2d at 75. We agree with the position of respondent's counsel that *Colsey* is distinguishable and that disbarment is not called for.

65 N.J. at 178, 320 A.2d at 475.

Whatever freedom the district court possessed independently to draw inferences from the facts and circumstances, the court could not, with fealty to consistency, disregard the interpretation of New Jersey state law by that state's highest court and at the same time profess

to "hold the greatest respect for, and give due weight and consideration to, the views of the [New Jersey] Supreme Court."

B.

Local Rule 7 provides for disciplinary proceedings of one who has been disbarred or suspended from practice in any state, Rule 7(2)(b), and one who is "guilty of conduct unbecoming a member of the bar of this court", Rule 7(2)(d). The rule to show cause entered against Abrams clearly was limited to Rule 7(2)(d) and 7(2)(b):

> It appearing that Arthur Lawrence Abrams may have been guilty of conduct unbecoming a member of the Bar of this court; and
>
> It further appearing that the said Arthur Lawrence Abrams was suspended from the practice of law by order of the Supreme Court of New Jersey dated June 3, 1974. . . .

The second paragraph of the rule relates to the state proceedings in which the only charge considered was the issuance by Abrams of a check for $20,000. We agree with the United States Attorney's assertion that "[a]lthough several charges were initially filed against Abrams, only one charge [the $20,000 payment from the trust fund] is now relevant." U.S. Attorney's Brief at 4. Unfortunately, the district court did not limit its consideration to that matter. Instead, it also considered the $102,000 real estate commission shared by Abrams:

> Another factor is that Abrams accepted a share of a real estate commission paid by the City of Jersey City on the sale of property on public bid. He deposited that share in his trust account, ex-

> plaining that he considered it to belong to the client, but no credible explanation was provided for the making of the payment in the first place. The commission aspect bears all the indications of a device to divert public funds into channels from which they could be repaid secretly to the public officials. Justification for its payment is not satisfactorily shown.

385 F. Supp. at 1211. Consideration by the district court of the "commission aspect" was impermissible for two reasons.

First, although the presentment of the county Ethics Committee contained a finding that the sharing of the brokerage commission violated New Jersey law, this charge was later "withdrawn by the Committee", *In re Abrams, supra,* 65 N.J. at 176, 320 A.2d at 473, and not considered by the New Jersey Supreme Court. *Ibid.* at 177, 320 A.2d at 474. Therefore, insofar as the district court disciplinary proceeding derived from New Jersey's suspension of Abrams, *see* Local Rule 7(2)(b), page 21 n.7 *supra,* the district court could not, with propriety, rely on the "commission aspect" of the original presentment.

Second, insofar as the district court disciplinary proceeding derived from "conduct unbecoming a member of the bar" separate and apart from that considered in the New Jersey state court proceedings, the lower court was obliged to follow its own procedural rules. This it failed to do. Local Rule 7(4), page 22 n.7 *supra,* provides that proceedings relating to "conduct unbecoming a member of the bar of this court" "shall be presented to the chief judge, and, if he deems the charges of professional misconduct of sufficient weight, he shall refer them for pre-

liminary investigation and recommendation to a committee of members of the bar of the court designated by him or to the United States Attorney." The reference procedure was not followed; nor were the procedures governing reception of any recommendation of the committee designated or the United States Attorney followed.

It is argued that the failure of the district court to follow the provisions of Local Rule 7(4) can be justified because "[*t*]*hese things* had been done in the state proceeding which [Abrams] states were not 'wanting in due process in any respect'. He specifically asked the District Court to decide the matter on the basis of the *entire state record*. He did not ask for further investigations which might have led to the filing of yet additional charges. He was content to avoid further proceedings then. He cannot be heard to complain now that their lack prejudiced him in any way. He was found on the basis of the record which he declined to supplement to have been guilty of the *precise misconduct originally charged* and that record overwhelmingly supports that charge and amply justifies his disbarment." U.S. Attorney's Brief at 34-35 (our emphasis) (appendix reference omitted).

The deficiency in this argument is that that part of the "precise misconduct originally charged" by the Ethics Committee relating to the $102,000 commission was withdrawn by that committee and not considered by the state court. When Abrams "specifically asked the District Court to decide the matter on the basis of the entire state record", he had the right to assume that the federal court was only going to consider the $20,000 payment. He had the right to assume that in the absence of a Local Rule 7(4) procedure, the only matter relevant in the district court was the charge considered by the state court.

Appendix A

As we have previously observed, the United States Attorney in his brief agrees that "[a]lthough several charges were initially filed against Abrams, only one charge is now relevant." If only one charge is relevant before this court, only one charge should have been relevant before the district court. If the district court chose, as was its right under 7(2)(d), to go beyond the state court proceeding and examine other aspects of Abrams' "conduct unbecoming a member of the bar of this court," it was obliged to follow its own rules. The United States Attorney cannot now, with consistency, argue that Abrams waived[8] his right to Local Rule 7(4) procedures to defend against charges not processed in the state court, and at the same time agree that only one charge is relevant to these proceedings—that concerning the $20,000 payment.

Accordingly, we hold that the district court erred in considering the "commission aspect" of Abrams' conduct.

Finally, the district court considered its "view" that "[t]he acquisition of an interest in the client's enterprise was obviously a factor that interfered with the exercise of free judgment on behalf of the client." 385 F. Supp.

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[8] The United States Attorney also appears to argue that the burden of initiating the independent investigation under Local Rule 7(4) was on Abrams. "[Abrams] did not ask for further investigations which might have led to the filing of yet additional charges. He was content to avoid further proceedings then. He cannot be heard to complain now that their lack prejudiced him in any way." U.S. Attorney's Brief at 35. We disagree. The clear meaning of Local Rule 7(4) is that the Chief Judge initiates the reference procedure and that the procedure is mandatory. "[The *Chief Judge*] *shall* refer [the charges of professional misconduct] for preliminary investigation and recommendation . . . ." *See* page 15 n.7 *supra* (emphasis added).

at 1211. For the same reasons that it was impermissible under these circumstances for the district court to consider the "commission aspect", so also was the district court precluded from relying on this perceived impropriety in assessing a greater sanction than the state court. Indeed, if anything, the case against the district court's considering this aspect of Abrams' activities is even stronger, for it was not the subject of any charge contained in the Ethics Committee presentment.

The district court's judgment of disbarment will be reversed.

ROSENN, *Circuit Judge*, concurring.

I join in the majority opinion. I write to emphasize what I believe should be the proper standard for federal disciplinary action based upon a record compiled in state proceedings.

Each federal court has a broad independent power to discipline members of its bar, initiate and conduct disciplinary proceedings, and impose sanctions predicated upon the record it has compiled. *See Theard* v. *United States*, 354 U.S. 278, 281 (1957). The independence of a district court acting in such fashion circumscribes our authority to review its disciplinary actions. *See Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824). When, however, the disciplinary action is dependent on a record developed in state proceedings, I believe the district court should, absent exceptional circumstances, impose the same sanctions prescribed by the state.

This standard is founded upon the vital principle of comity, which represents a "belief that the National Gov-

ernment will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971). Comity recognizes that the founding fathers created a system "in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

In the United States, admission to the bar and discipline of attorneys is peculiarly within the province of the states. *See In re Dreier,* 238 F.2d 68 (3d Cir. 1958). This is the practice in this circuit. New Jersey, for example, has a comprehensive and thoughtful system dealing with every aspect of admission to the bar and any subsequent discipline. Admission to the bar of the District Court of New Jersey is derivative, dependent upon admission to the bar of the Supreme Court of New Jersey. Absent misconduct in the district court, disciplinary actions also are derivative in a sense, since they generally are based, as in the instant matter, on the previously compiled state record; they occur after the completion by the state of its proceedings.

The imposition of disbarment by the federal court when the state has imposed only suspension implicitly attacks the regularity and judgmental values of the state proceedings, implying that the sanction chosen by the state courts is inappropriate. This result is bound to create tensions between the state and federal judiciaries.

A second important policy behind the need to avoid disparate sanctions by the federal and state courts is the maintenance of public confidence in our legal system and in the bar. Disbarment is designed to protect the public. *In re Ruffalo,* 390 U.S. 544, 550 (1968). The district

court's action permits Abrams to practice in the state, but not the federal, system. Such an anomaly can only lead to confusion in the minds of the public, which justifiably may speculate why an attorney not qualified to practice in a federal court has sufficient moral character to practice in the state court. Unless an exceptional reason of record justifies such disparate treatment, its effect will, in my opinion, render a grave disservice to the public.

The Supreme Court has recognized the vitality of these interests in *Selling* v. *Radford,* 243 U.S. 46 (1917). The Court declared that it would afford the utmost respect in sanctioning members of its bar to the judgment of state proceedings unless there was a failure of due process, an infirmity of proof or some other "grave reason" not to give effect to the "natural consequences of the judgment. . . ." *Id.* at 51. Forty years later, in *Theard* v. *United States, supra,* the Court, while reaffirming the independence of the federal courts in disciplinary matters, directed a district court imposing sanctions based upon state proceedings to be guided by the standards of *Selling.*

We also have noted the importance of following the judgment of the state courts in these matters. *In re Dreier,* 258 F.2d 68 (3d Cir. 1958). The District Court for the Middle District of Pennsylvania had denied Dreier's application for admission to its bar on the ground that Dreier lacked good moral character due to events for which he had been suspended from the bar of the Luzerne County Court of Common Pleas. Prior to his application for admission to the federal bar, the county bar had restored Dreier to membership in good standing. This court held that the federal district court could not enter an order amounting to permanent disbarment based

upon events for which Dreier had paid the penalty imposed by, and had been restored to membership in good standing of, the bar which knew him best.

Finally, the teachings of *Selling* and *Theard* have not been lost upon the district courts throughout the country. Sixty-nine district courts responded to a survey asking whether they ever had deviated from disciplinary actions taken by the courts of their states. One district court, the Southern District of New York, responded that they had a rule permitting disparate discipline for the reasons announced in *Selling* or if "the misconduct established has been held by this Court to warrant substantially different discipline." Rule 5(d). Only three other district courts cited instances of deviating from the action of their state courts. One such instance was *In re Dreier,* just discussed. In another, the disbarment by the district court was reversed for lack of due process. *In re Jones,* 506 F.2d 527 (8th Cir. 1974). In the third instance, the district court had appointed a special master who had conducted a three-day hearing and received much evidence not heard by the Alaskan Supreme Court. *In re Mackay,* 298 F. Supp. 170 (D. Alaska 1969).

In sum, I believe the district court should have followed the standards of *Selling* and *Theard,* which impliedly were recognized by this court in *Dreier,* and which are acknowledged in practice at least by the overwhelming majority of the district courts throughout the country. There is no contention that the state proceedings lacked due process, and the parties stipulated to the relevant facts. The district court did not adequately explicate, and I do not perceive, any grave reasons for choosing more severe punishment than imposed by the Supreme Court of New Jersey.

Since the majority opinion, as I read it, does not preclude the district court from imposing the sanctions decreed by the state court, I join in the reversal.

Appendix A

ADAMS, *Circuit Judge*, Concurring and Dissenting

Since no particularized supplemental allegations were prepared for the district court, the basis for the charge in that court reasonably appeared to be that Arthur L. Abrams had issued a check for $20,000, to be used to bribe a municipal official. It was on this specific charge that the New Jersey Supreme Court had entered its judgment to suspend Abrams from the practice of law for one year.[1] And this charge necessarily must have been the one that Abrams and his counsel had in mind when they elected to rest on the record that had been before the New Jersey state court.

However, the district court did not confine itself to the bribery charge. Rather, "view[ing] the matter somewhat differently" from the New Jersey Supreme Court, the district court proceeded to consider two additional issues: Abrams' interest in his client's enterprise, and his acceptance of a real estate commission. Concerning these, the district court said:

> The acquisition [by Abrams] of an interest in the client's enterprise was obviously a factor that interfered with the exercise of free judgment on behalf of the client.
>
> Another factor is that Abrams accepted a share of a real estate commission paid by the City of Jersey City on the sale of property on public bid. He deposited that share in his trust account, explaining that he considered it to belong to the client, but no credible explanation was provided for the making of the payment in the first place. The commission

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[1] In re Abrams, 65 N.J. 172, 320 A.2d 471 (1974).

> aspect bears all the indications of a device to divert public funds into channels from which they could be repaid secretly to the public officials. Justification for its payment is not satisfactorily shown.[2]

The state court had taken a substantially diverse attitude toward these two items. As to the propriety of Abrams' association with the business venture of his client, the New Jersey Supreme Court was silent. Respecting the real estate commission, later deposited in the trust fund, the state court, on the same record had acknowledged that:

> Though the original creation of the trust fund itself by the respondent was suspect, the record does not permit a finding that it was specifically designed for the illegal payment.[3]

If the district court determined to go beyond the scope of the charges resolved against Abrams in the state proceeding, namely, the illegal $20,000 payment, and to consider other aspects of Abrams' conduct, it should have so advised Abrams and given him and his counsel the opportunity to introduce evidence relating to such conduct. Due process would seem to require as much.[4] No justification

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[2] In re Abrams, 385 F. Supp. 1210, 1211 (D. N.J. 1974) (citation omitted).

[3] 320 A.2d at 475.

[4] The parties have not disputed that a disbarment proceeding must satisfy procedural due process requirements. Thus, the only issue confronting the Court in this regard is the nature of the procedure that must be employed. *Cf.*, Goss v. Lopez, 95 S. Ct. 729 (1975). *See* Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975).

has been forthcoming that would excuse the failure to supply Abrams a full description of the charges to be considered.[5]

In a case presenting a situation similar to the one here, *In re Ruffalo,* the Supreme Court made it clear that in a disbarment case the charge against the attorney must be set forth at the outset. It said: "[disbarment] proceedings [are] of a quasi-criminal nature. The charge must be known before the proceedings commence."[6]

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[5] It is observed that local rule 7(4) for the United States District Court for the District of New Jersey seems to provide for a disciplinary procedure which—at least when it extends beyond the grounds relied upon in a state disciplinary process—calls for notice of the sort that is lacking here. See majority opinion note 7. But apparently the district court which promulgated the rule did not so interpret it, at least in the procedural context that developed here. Rather, the district court's actions suggest that it believed its rules were implemented by the procedures followed in this case.

Because the interpretation of local rules is primarily committed to the district court that promulgates them, and because their meaning in the present context appears somewhat uncertain, I am constrained to reach the question whether constitutional due process has been satisfied.

[6] In re Ruffalo, 390 U.S. 544, 551 (1968) (citation omitted). Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868).

In three cases subsequent to the *Ruffalo* decision, the Supreme Court has reaffirmed that, before proceedings to withdraw a state-controlled benefit are undertaken, a respondent must be given both notice of the reasons urged in support of the contemplated action and an opportunity to respond. Perry v. Sinderman, 408 U.S. 593 (1972) (employment termination); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefit termination).

Nor is it valid to contend that Abrams waived his right to know the charges on which the sanction was to be based, or his right to an opportunity to offer a defense against any and all such charges. There is nothing in the district court record which adequately demonstrates that Abrams was aware that charges respecting his relationship with his client and the $102,000 trust fund were under consideration.[7] Where the duty to apprise Abrams of the full reach of a disciplinary inquiry was not discharged, it would not seem reasonable to conclude that Abrams waived his right to present evidence on the two matters that supported, at least in part, the district court's judgment, independent of the state court conclusion.[8]

I therefore agree with the majority that the judgment of the district court cannot stand. There is no way to determine from the record what disciplinary sanction the district court might have imposed had it confined itself—as its rule[9] seems to indicate and due process requires

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[7] Some intimation of the breadth of the district court inquiry was discussed at the hearing on June 24, 1974. Transcript 6-10.

[8] The Supreme Court has indicated forcefully that even in a civil case involving a sophisticated corporate party, the rudiments of due process—notice of charges and a fair opportunity to be heard—are not lightly presumed waived. In Ohio Bell Tel. Co. v. Public Utility Commission, 301 U.S. 292 (1937), the Supreme Court held, "We do not presume acquiescence in the loss of fundamental rights." *Id.* at 307, *quoted* in D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 186 (1972). The standard for finding waiver in the case at hand, a "quasi-criminal" proceeding, should be no less.

[9] Note 5, *supra.*

—to the charge adjudicated in the state proceeding and the record that the parties specifically stipulated.

However, unlike the majority, I do not believe that an outright reversal is warranted. Rather, I would vacate the judgment that was entered and remand the case. This would allow the district court a further opportunity to reach its judgment regarding the extent of the discipline, based on the issue derived from the state proceeding, or else to seek to have additional charges filed as rule 7 seems to authorize, plus the opportunity afforded Abrams to meet such additional charges.[10]

Chief Judge Seitz and Judge Van Dusen join in this opinion.

VAN DUSEN, *Circuit Judge*, concurring and dissenting:

While joining in the separate opinion of Judge Adams for reversal and remand due to Local Rules 7(2)(d) and 7(4), I find this an exceedingly close case as to whether affirmance is required on this record, as contended in the United States Attorney's brief, and respectfully state these views not stated in Judge Adams' opinion. I emphasize the majority's language that "the starting point

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[10] Whether it is wise or unwise for a federal district court in a situation like the present one to impose disbarment when the highest state court has imposed a temporary suspension is, of course, not before this Court. However, it should be noted that in this regard the Supreme Court has advised the federal courts respecting the considerations that govern a federal disciplinary proceeding that follows a state investigation. Theard v. United States, 354 U.S. 278, 282 (1957); Selling v. Radford, 243 U.S. 46, 51 (1917).

for analysis is the unquestioned principle that the District Court of New Jersey, like all federal courts, has the power both to prescribe requirements for admission to practice before that court and to discipline attorneys who have been admitted to practice before that court" (p. 10) and that its discipline "may be at variance with that taken by the state court system" (p. 16).[1] See *In re Fleck,* 419 F.2d 1040 (6th Cir. 1969).

The district court is entitled to regulate its bar, *inter alia,* in order to assure proper advocacy to assist it in the conduct of its judicial functions. In *Selling* v. *Radford,* 243 U.S. 46, 50 (1917), the Court emphasized "the condition of fair private and professional character, without the possession of which there could be no possible right to continue to be a member of this Bar."

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[1] In the case of *Ex parte Burr,* 22 U.S. (9 Wheat.) 529, 530 (1824), from which the majority quotes at pages 10 and 11 of its opinion, the Court stated at page 530:

> "If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case. Some doubts are felt in this court respecting the extent of its authority as to the conduct of the circuit and district courts towards their officers; but without deciding on this question, the court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper."

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1029

In the Matter of

ARTHUR LAWRENCE ABRAMS,
an Attorney-at-Law,

ARTHUR LAWRENCE ABRAMS,

Appellant

(D.C. Misc. No. 74-53)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, ROSENN, HUNTER and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 12, 1974, be, and the same is hereby reversed. Costs taxed against appellee.

ATTEST:

THOMAS F. QUINN
Clerk

June 30, 1975

APPENDIX C

Amended Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1029

In the Matter of

ARTHUR LAWRENCE ABRAMS
an Attorney-at-Law,

ARTHUR LAWRENCE ABRAMS,

Appellant

(D.C. Misc. No. 74-53)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, ROSENN, HUNTER, and WEIS, *Circuit Judges*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Appendix C

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 12, 1974, be, and the same is hereby reversed. Each party to bear its own costs.

ATTEST:

THOMAS F. QUINN
Clerk

July 14, 1975

APPENDIX D

Opinion and Order of the United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Misc. No. 74-53

In the matter of

ARTHUR LAWRENCE ABRAMS,
an Attorney at Law

OPINION AND ORDER

(Filed—December 10, 1974)

By orders dated June 3 and June 19, 1974, the Supreme Court of New Jersey suspended Abrams from the practice of law for 1 year, effective July 1, 1974, and until the further order of the Court. These disciplinary proceedings on order to show cause under Local Rule 7 followed.

The facts and circumstances are adequately detailed in the opinion of the Supreme Court, 65 N.J. 172 (1974) and need not be repeated here. It was recognized there that Abrams' participation in activities leading to the payment of a bribe to a public official was improper. It was also indicated that his interest in salvaging his investment share of the client's enterprise, to protect which the bribe was paid, and the existence of extortionate ele-

ments in the demands of the public officials, were mitigating factors to be given effect in selecting the degree of disciplinary action to be taken.

We view the matter somewhat differently. The acquisition of an interest in the client's enterprise was obviously a factor that interfered with the exercise of free judgment on behalf of the client. *Code of Professional Responsibility,* Canon 5, EC 5-1, 5-2 and 5-3; DR 5-103 and 5-104.

Another factor is that Abrams accepted a share of a real estate commission paid by the City of Jersey City on the sale of property on public bid. He deposited that share in his trust account, explaining that he considered it to belong to the client, but no credible explanation was provided for the making of the payment in the first place. The commission aspect bears all the indications of a device to divert public funds into channels from which they could be repaid secretly to the public officials. Justification for its payment is not satisfactorily shown.

We see no basis for distinguishing this case from *In re Colsey,* 63 N.J. 210 (1973). Professional misconduct, like fraud, takes many forms. Variations in detail are not significant when the underlying character is the same. A lawyer who countenances and assists client misconduct for the payment of an extortionate bribe countenances two offenses: one, the extortion and two, the bribe. His minimum duty in such circumstances is to advise the client against it in the strongest terms, and if the client persists, to disassociate himself from the matter promptly and completely. And, since a communication in the course of legal service sought in aid of the commission of a crime or fraud is not privileged, N.J. Ev. Rule 26 (2) (a), he may be under a further duty to report the matter to proper authorities.

Appendix D

Abrams is a member of the bar of this Court by derivative admission on motion, by virtue of his status as an attorney licensed to practice by the Supreme Court of New Jersey. *Local Rule* 4. Ordinarily, a suspension, disbarment or censure by the Supreme Court of New Jersey will result in corresponding action here. *Local Rule* 7. But this accommodation does not necessarily suffice to discharge the independent obligation of this Court to take appropriate action on its own rational analysis and determination, although in doing so it will hold the greatest respect for, and give due weight and consideration to the views of the Supreme Court. *In re Ruffalo,* 390 U.S. 544 (1968); *In re Wilkes,* 494 F.2d 472, at 474-5 (C.A. 5, 1974).

Then, too, there will be cases in which this Court will act first. If an attorney be convicted of a crime in this Court, or commits an act of professional misconduct in connection with a matter before this Court, a disciplinary proceeding may begin here and be concluded here, or may take the form of a temporary suspension here pending disciplinary proceedings here or before the Supreme Court. In either case, this Court would duly inform the Supreme Court of the pendency of the matter, and of the outcome, so that it might proceed to carry out its functions under N.J. Const. 1947, Art. 6, §2, par. 3. The same would be true in the case of attorneys disciplined here who are admitted to the practice of law in other jurisdictions.

Differences in disciplinary action as between this Court and the Supreme Court could give rise to practical difficulties for the disciplined lawyer. If the Supreme Court's discipline be more severe than ours, it will likely control the practical impact because the ability to practice before this court would have little meaning without the ability

to practice law in New Jersey. If this Court's discipline be more severe, the practical impact will be lessened considerably by the lawyer's ability to practice law in New Jersey although not in this Court.

Since the instances in which the two Courts will have different views are not likely to be frequent, and since the practical impact of the Supreme Court's view will necessarily predominate, we do not think the risks are sufficiently great to permit the withholding of different views when they are held by this Court.

ORDER

For the reasons stated, it is hereby ORDERED that the name of Arthur Lawrence Abrams be, and the same hereby is, stricken from the roll of attorneys permitted to practice before this Court, and until the further order of the Court.

DATED: 12-10-74

s/ LAWRENCE A. WHIPPLE, Chief Judge

s/ JAMES A. COOLAHAN, Senior Judge

s/ GEORGE H. BARLOW, U.S.D.J.

s/ FREDERICK B. LACEY, U.S.D.J.

s/ VINCENT P. BIUNNO, U.S.D.J.

s/ HERBERT J. STERN, U.S.D.J.

s/ H. CURTIS MEANOR, U.S.D.J.

Original to Clerk

Appendix D

COHEN, Senior Judge, with whom Judge FISHER joins, dissenting:

It is well settled that the federal judiciary may review the results of a state court proceeding involving the discipline of an attorney. Both the scope of such a review, and the weight to be accorded a state court's disposition are set forth in *Selling* v. *Radford*, 243 U.S. 46 (1917). A case of more recent vintage which addressed similar questions, and affirmed the vitality of *Selling* was *Theard* v. *United States*, 354 U.S. 278 (1955). While I do not question the power of this court to impose a sanction different from that imposed by the Supreme Court of New Jersey, I question the advisability of such a course of action. Furthermore, although this court may act independently of the state court determination, such independence is narrowly confined by the language of *Selling* itself. The Supreme Court took pains to mark the limited scope of federal review:

> ". . . [W]e should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that *some other grave reason* existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except

upon the conviction that, under the principles of right and justice, we were constrained so to do." 243 U.S. at 51. (emphasis supplied)

No question is presented here as to whether the hearing accorded the attorney by the state court was consistent with due process, nor is there any dispute regarding the facts. What, then, is the "grave reason" for this court to pronounce a harsher judgment than that imposed by the state judiciary? I must confess that I cannot discern in the majority opinion the answer to this crucial question. The majority cites *In re Ruffalo*, 390 U.S. 544 (1968) and *In re Wilkes*, 494 F.2d 472 (5th Cir. 1974) in support of its position that the federal judiciary must independently act in disciplinary matters. These cases, however, simply affirm the principles of due process which must be followed in the conduct of such disciplinary proceedings. Neither these cases, nor the instant case, deal with a "grave reason," which would justify a different disposition by this court.

Notwithstanding the absence of a response to the crucial question of "grave reason," I dissent as a matter of policy. Assuming that the purpose of the harsh sanction advocated by the majority is to deter future wrongdoers, deterrence is certainly not advanced by the possibility that Abrams may, at some future time, be permitted to practice in the state courts. While there may be cases which might justify disparate treatment, I am not convinced that this is such a case.

The majority takes issue with the Supreme Court of New Jersey for distinguishing this case from *In re Colsey*, 63 N.J. 210, A.2d (1973), where the attorney was disbarred. Placing aside for the moment the question of whether this court should engage in a contest

with the State Supreme Court over the merits of the distinction, this case is distinguishable from *Colsey* in at least three ways: (1) in this case, the disciplined attorney himself, as a part owner of the business, was a victim of the extortion; (2) here, the disciplined attorney did not retain part of the "pay-off" as a "fee"; and finally, (3) unlike *Colsey* there was no deliberate attempt in this case to perpetrate a tax fraud.

I do not find the state court's distinction to be without basis. The majority's position, simply stated, is:

> "Professional misconduct, like fraud, takes many forms. Variations in detail are not significant when the underlying character is the same." *Ante* at 2.

This is an oversimplification of the facts, and of the state court opinion.

I do not quarrel with the sentiments expressed by the Court with regard to unethical conduct; in fact, I wholeheartedly endorse such a standard for all attorneys in all states. In my opinion, however, such sentiments are largely irrelevant to the true import and impact of the majority opinion.

It is quite understandable that the Court should be reasonably exercised and concerned with the improprieties of members of the Bar, especially in light of the increased awareness of the public to such activities. In this Watergate area of "dirty tricks, laundered money," perjury, obstruction of justice, corruption and related matters, one must not lose sight of the more mundane aspects of the legal and judicial process, as it pertains to the interrelationship of the federal and state judiciary. In its effort to weed out unethical practices, wherever and whenever

they occur, the Court may have lost sight of the past practice in this, and other districts, regarding disciplinary proceedings.

For the first time in the history of the District of New Jersey, or for that matter in the history of any district within the Third Circuit, our Court has refused to be bound by a state court determination in a disciplinary matter. No explanation is given for this sharp divergence from past practice other than the independence of the federal judiciary. Certainly the independence of the federal judiciary cannot be the "grave reason" required by *Selling*. Although the majority opinion recognizes the derivative nature of admission to the federal bar, it glosses over the remainder of the State machinery with regard to bar admission and attorney discipline. Some elucidation would be appropriate in these circumstances.

Fully forty-five of the New Jersey Court rules, with myriad subdivisions, deal with nearly every imaginable aspect of qualifications for admission to the bar, actual admission, and any subsequent discipline of one who is admitted. There is in existence in New Jersey a comprehensive and thoughtful scheme for dealing with the cumbersome and ofttimes complex questions of who should and who should not be authorized to engage in the practice of law.

Admission to practice in our courts is derivative. It is the state who conducts bar examinations. It is the state who maintains committees on character and fitness and ethics. The federal courts have no such machinery and rely exclusively on the state system in determining who shall be admitted to its bar. To make an independent evaluation of applicants to the federal bar would be expensive, cumbersome and unnecessary. Likewise, disci-

plinary proceedings in our courts ofttimes follow upon the coattails of extensive records and hearings in the state courts and their duly authorized committees. Therefore, in a sense, our disciplinary proceedings are also derivative because based in part on a previously compiled state record.

With this structural background in mind, it is difficult to see the basis for this sudden surge of independence on the part of our Court. Disparity does little to bolster the public respect for the judiciary and does less for federal-state cooperation.

In this regard let us examine the possibly anomalous results of this newly found independence. An attorney suspended from practice for one year by the state system, but disbarred by the federal system, would thereafter be permitted to practice in the state courts but not in the federal courts. Is this person a practicing attorney or not? Are the ethical sensitivities of the federal bench so much greater than their state counterparts? What is the public to think of such a situation, especially with its current disenchantment with the legal profession?

What of comity? After long years of joint efforts to ease the natural tensions between two parallel judicial systems operating within the same state, are we to totally disregard all notions of coordination? There are already enough areas of potential friction between the state and federal judiciaries. *See Helfant* v. *Kugler,* 500 F.2d 1188 (3rd Cir. 1974) *cert. granted,* U.S. , 43 U.S. L.W. 3291 (Nov. 19, 1974). On August 16, 1974 the Conference of Chief Justices unanimously passed a resolution urging greater cooperation and communication between state and federal courts. (See Appendix A). I am reluctant to carve out yet another area of possible

abrasiveness, particularly where the facts do not require such action. The majority believes, however, that an independent disciplinary proceeding is necessary. While *Selling* v. *Radford, supra,* permits such an independent examination, it does so within narrow limits. I believe that my colleagues have transcended those limits. I believe that under certain circumstances, a sanction other than the one imposed by the state court might, perhaps, be appropriate. I can discover no "grave reason" for departing from the judgment of the Supreme Court of New Jersey in this case. Such a course of action flies in the face of comity, and should be undertaken with great reluctance. As has been pointed out in another context, "comity" is

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971).

With all due respect, I do not believe that the majority has shown the proper regard for what has traditionally been a state function. I conceive the majority opinion to be analytically unsound, and an unwise disservice to the concept of federal-state cooperation.

It would seem to be incumbent upon our court to engage in extensive discussions and negotiations with the New Jersey Supreme Court in order that some orderly procedure might be established to integrate and accommodate the state and federal disciplinary systems. The Supreme Court of New Jersey has already indicated its

willingness to conduct such joint efforts. A system should be devised whereby the federal bench can review the evidence, make recommendations, submit its views, and generally participate in any judicial disciplinary hearings on the state level. But the New Jersey Supreme Court should render the decision and the federal bench, as a matter of policy, should be guided thereby. This is the only method which would recognize the derivative nature of practice in the federal courts.

Of course, our court should be more concerned, than the State courts, where a disciplinary proceeding is based upon misconduct of a federal official, or upon conviction of a federal offense, or upon some transgression committed during an appearance in a federal court. In instances such as these, where the federal system gives rise to the disciplinary proceedings, the state court has displayed no reluctance in taking appropriate action with dispatch. Heretofore, the New Jersey Supreme Court has exercised a diligent watch over just these sorts of transgressions. *See e.g.,* the most recent case of *In the Matter of Louis M. Turco,* —— N.J. ——, —— A. 2d —— (D-11, filed Nov. 6, 1974), wherein an attorney who had previously pleaded guilty to tax fraud in the federal court was subsequently disbarred from practice in the state courts. This is but one example of the good faith effort on the part of the State Supreme Court to accommodate the federal system. Furthermore, it serves as another example of the cooperation which has heretofore existed and which is now threatened.

Finally, the majority opinion contends that disparity between the state and federal systems will be infrequent. It cannot be said with certainty that differences in opinion will be infrequent. We have one example before us

—how many others are lurking in the "corners of our profession?" Even one difference of opinion requires some joint federal-state effort at resolution. The time has come to openly confer with the members of the New Jersey Supreme Court in the hopes of arriving at an expeditious solution to the problem which now threatens to rend asunder the fragile fabric of cooperation between the two systems. For the present, however, I strenuously resist any effort on the Court's part to seize this particular opportunity to impose a sanction different from that of the New Jersey Supreme Court.

As Chief Justice Hughes has recently pointed out in a letter to Chief Judge Whipple of our court: "After all, we act under like constitutional obligations, have equally high respect for our profession and serve the same public in the administration of justice."

For the above reasons, I would direct, as did the State Supreme Court, that Arthur Lawrence Abrams be suspended from the practice of law for one year, and until the further order of this Court.

MITCHELL H. COHEN, SENIOR JUDGE
UNITED STATES DISTRICT COURT

CLARKSON S. FISHER, JUDGE
UNITED STATES DISTRICT COURT

Appendix D

APPENDIX "A"

RESOLUTION

VIII

WHEREAS, the Conference of Chief Justices in 1971 endorsed the efforts of the Chief Justice of the United States to improve the channels of communications between state and federal courts and to eliminate abrasiveness in state-federal judicial relationships; and

WHEREAS, much improvement between state and federal judicial relations has resulted from an interchange of ideas and a discussion of mutual problems between state and federal judges through State-Federal Judicial Councils; and

WHEREAS, in recent months there have been in a few federal district courts and circuit courts of appeals certain decisions which threaten to negate the effectiveness of efforts to improve state and federal judicial relationships in that these federal courts, below the United States Supreme Court level, unreasonably have invaded areas which historically and traditionally are recognized to be within the exclusive jurisdiction of state courts, as for example the matter of state bar admissions and the internal administration of state court systems;

NOW, THEREFORE, BE IT RESOLVED by the Conference of Chief Justices duly assembled in Plenary Session on August 16, 1974, as follows:

1. That each state judicial system is urged to continue its efforts to bring about a cooperative and cordial relationship between state and federal judicial systems through open communication and with the interchange of ideas and mutual recognition of

the responsibilities of each system through State-Federal Judicial Councils and other means.

2. That the "exhaustion of state remedies" doctrine must be strictly adhered to in areas which have historically and traditionally been within the exclusive jurisdiction of state courts, including state bar admissions and internal administration of state court systems and in the joint jurisdiction of the federal and state authorities; otherwise, the marked improvement in state-federal judicial relationships which has occurred in recent months will be substantially eroded.

3. That various organizations interested in proper state-federal judicial relationships, including State-Federal Judicial Councils, the Federal Judicial Center, the Administrative Office of United States Courts, the National Conference of Federal Trial Judges, the Judicial Conferences of United States Courts, and the State-Federal Judicial Relations Committee of the American Bar Association, be called upon to bring to the attention of their judicial members the importance of maintaining proper and cooperative relationship between state and federal judiciaries in the areas above delineated.

4. That Congress is called upon to enact legislation requiring the exhaustion of state judicial remedies before federal courts may entertain jurisdiction of matters which have been traditionally and historically within the exclusive jurisdiction of state court systems such as bar admissions and the internal administration of state judicial systems.

APPENDIX E

Per Curiam Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

No. D-1—September Term 1973

In the Matter of

ARTHUR LAWRENCE ABRAMS,
an Attorney at Law.

Argued February 19, 1974. Decided June 4, 1974

Mr. Frederick C. Vonhof for the order.

Mr. Clive S. Cummis argued the cause for the respondent (*Messrs. Sills, Beck, Cummis, Radin and Tischman,* attorneys; *Mr. Jeffrey Barton Cahn* and *Mr. Jerald D. Baranoff,* on the brief).

PER CURIAM:

The Essex County Ethics Committee charged the respondent with ethical violations in a presentment dated May 16, 1973, later modified in a supplemental report dated December 13, 1973.

In 1967 the respondent became aware, through C. B. Snyder, a business associate and real estate broker, of the impending sale of Jersey City waterfront property which was suitable for transformation into a port facility. He communicated with his client Ezra Sensibar, Presi-

dent of Construction Aggregates Corporation, which specializes in the building and operation of port facilities. Thereafter the ESCA Corporation was formed to bid on the Jersey City property. The respective ownership interests in ESCA were Construction Aggregates Corporation 60%, Snyder 20% and respondent 20%. An auction of the property was held in Jersey City on August 1, 1967 and ESCA was the successful bidder for the sum of $2,040,000. The property was isolated from city services and it was necessary that water and sewer facilities as well as access roads be provided. A meeting was arranged with John V. Kenny, the then Hudson County political leader, who assured Sensibar that there would be wholehearted official cooperation in the development of the port facility proposed by ESCA.

Towards the close of 1968 Jersey City adopted resolutions letting contracts for the construction of roads and the laying of sewer and water pipes to the property acquired by ESCA. At about the same time, a resolution was adopted authorizing payment of a 5% brokerage commission to C. B. Snyder Realty, Inc. The commission amounted to $102,000 and half, namely, $51,000, was paid to the respondent pursuant to an earlier arrangement between Snyder and the respondent. The respondent testified that although the $51,000 was his to do with as he pleased, he considered that he should ethically turn it over to ESCA. He did that by placing it in an "Arthur Lawrence Abrams Trust Account" in the National Newark and Essex Bank; at one point he described the $51,000 in the trust account as "an emergency fund."

As time went on and as the financial commitments of ESCA (renamed Port Jersey Corporation) and those associated with it became deeper and deeper, the lack of cooperation by the Jersey City officials became evident.

Appendix E

Despite the resolutions letting contracts for the construction of roads and the laying of sewer and water pipes, work had not been commenced and permits had not been issued when the respondent and Snyder were advised that a so-called "political contribution" was expected by the Jersey City officials. It was suggested that Sensibar should see Flaherty, then President of the Jersey City Council. The respondent testified that he called Sensibar who said "leave it to me." Sensibar testified that when he met with Flaherty on April 19, 1969 he knew that the money that had already been invested "would all go down the drain if we didn't somehow make peace and get quick cooperation from City Hall." He was disposed to make "a campaign contribution" of $20,000 in cash "to get that peace." He testified further that after his April 19 meeting with Flaherty he conferred with Snyder and the respondent and "they both said that it was unrealistic to expect that we could do as much construction work, as much business as we were doing in Hudson County without acceding to a shakedown of some kind. They thought that $20,000 in the circumstances might be nominal and they urged that I should arrange for us to pay it." Under date of April 22, 1969 the respondent issued a check in the sum of $20,000 on his trust account. The check was made payable to Construction Aggregates Corporation and was stated on its face to be "For Engineering Services." The respondent sent the check to Sensibar who cashed it and who arranged to have the $20,000 in cash delivered to Flaherty.

The presentment embodied the following findings with respect to the $20,000 payment: "Respondent characterizes such payment as extortion and the city officials as extortioners and what has transpired would so indicate, however, respondent was a participant and it was through

the trust funds in his possession that such payment was made. Respondent was well aware of the reasons underlying the making of such payments. Though respondent owed a duty to his client to act zealously in its behalf and for its best interests, and to make disbursements from the trust fund as it directed, nevertheless respondent was under an obligation to act within the bounds of the law, and obey his own conscience. Direct participation is denied by respondent, however, he was the conduit through whom such payments were made, and to that extent he did participate in the transaction."

In October 1970 Mr. MacMillan, Vice President of Port Jersey, told the respondent that several months earlier he "had a problem with a building permit" and had paid out the sum of $1200. He requested a check for the $1200 from the respondent's trust account but by that time the funds in the trust account had apparently been transferred to a certificate of deposit in the National Newark and Essex Bank in the name of Port Jersey. In response to MacMillan's request the respondent arranged in effect for the bank to issue its check dated October 7, 1970 in the sum of $1200 payable to Port Jersey. The respondent testified that he did not learn until much later that the $1200 represented "a pay-off to the building department of Jersey City." In the presentment the Committee made no specific factual finding in this regard although in its supplemental report, after referring to both the $20,000 payment and the $1200 payment, it said: "The total testimony reflects respondent's knowledge that the enterprise of which he was one of the principals, as well as its legal counsel, was compelled to pay $21,200 to certain public officials in aid of the furtherance of the development of the project."

Appendix E

In the presentment the Committee found that $3860 had been paid from the respondent's trust funds to Frank Murray, President of the Jersey City Local of the International Longshoremen's Association, in violation of N.J.S.A. 2A:93-7. However, in the supplemental report this finding has been withdrawn. The Committee was satisfied on the basis of further testimony submitted to it, "that there was no impropriety on the respondent's part in participating" in the payment to Murray. The presentment also contained a finding that the sharing of the brokerage commission in the manner described was violative of N.J.S.A. 40:60-26(d)—since repealed by L. 1971, c. 199, § 29. However we gather from the supplemental report that this finding has also been withdrawn by the Committee.

The supplemental report reiterated the Committee's earlier finding "that the respondent knowingly was a conduit in the furtherance of illegal payments to public officials." It rejected the respondent's contention that he had no alternative but to comply with Sensibar's request that he turn over $20,000 from the trust funds so that it could be used to satisfy the extortionate demands of the city officials. It suggested that the respondent might have instituted legal proceedings to obtain the required official action, that he might have reported the matter then or in due time thereafter to the State or other duly constituted law enforcement officials, or that he might have in timely fashion withdrawn completely from the matter. In any event the Committee was firm in its opinion that the respondent's ethical duties were not to be measured simply by the "legality or illegality of his client's acts" and that compliance with the client's demands "for moneys in the lawyer's possession under the circumstances of this case is not a full discharge of the lawyer's ethical obligation."

Appendix E

The Committee stated that it reached its conclusions "with regret because the record in this case and the personal knowledge of the members of the Committee establishes beyond question that respondent's performance as a man and as a member of the Bar of this State over the years is a record not only of outstanding accomplishments but also of dedication to the highest ideals of the legal profession. He interrupted his legal career to serve in the Armed Forces. When he returned to civilian life and the practice of law he devoted much of his time and strength to the service of the members of the Bar and the students of the law; he has taken an active part in bar association activities; he is a former chairman of this Committee; he has taught law and he has assisted other teachers of the law in working on drafts of uniform laws."

We do not consider that either the payment to Murray or the sharing of the brokerage commission is now before us. And we are not satisfied that the record is sufficient to establish participation by the respondent in the $1200 payment to Jersey City's building department. However we consider that the respondent's knowing participation in the $20,000 payment to the Jersey City officials was firmly established. The purposes surrounding the original creation of the trust fund is nowhere unequivocally acknowledged though the Committee in its presentment concluded that the "$51,000 retained in respondent's possession in a trust account that contained only Port Jersey money was used by Port Jersey to make irregular payments which would not be reflected upon the corporate books of Port Jersey." Be that as it may there is no basis for doubting that the respondent was fully aware that the $20,000 check drawn by him from the trust funds in his possession and turned over by him to Sensibar was to be cashed and the cash to be used to

satisfy the illegal extortionate demands of the Jersey City officials. The respondent also was fully aware that the $20,000 was not "For Engineering Services" as the face of the check drawn by him set forth; the fact that Sensibar's company may then have been owed moneys for engineering services was immaterial since the $20,000 was not actually intended or disbursed as payment for its engineering services.

Little regard need be paid to the "political contribution" cover by the Jersey City officials. They well knew that their demand was a corrupt one involving extortion or bribery or both. See *In re Colsey,* 63 N.J. 210, 211 (1973); *cf.* N.J.S.A. 2A:105-1; N.J.S.A. 29:93-6; *State* v. *Begyn,* 34 N.J. 35, 45-49 (1961); *State* v. *Seaman,* 114 N.J. Super. 19, 31 (App. Div.), certif. denied, 58 N.J. 594 (1971), *cert. denied,* 404 U.S. 1015, 30 L.Ed.2d 662 (1972). Similarly all of the parties including the respondent well knew the illegal nature of the demand and that "the payment would be corrupt." *In re Colsey, supra,* 63 N.J. at 211. It may be assumed, as the respondent asserts, that here there was extortion rather than bribery and that Port Jersey was the victim rather than the movant. But, as was pointed out in *Colsey,* "with respect to the ethics charge, it would be no defense that respondent's conduct, if unethical, related to 'extortion' rather than 'bribery' ". 63 N.J. at 211 n. 1.

It is urged before us that Sensibar should be viewed simply as an unwilling victim who bowed to extortionate demands and as such is not subject to charges of criminality or illegality. But we are not here concerned with the consequences of this conduct to Sensibar. We are concerned with the respondent, a member of the bar who, apart from his financial interest in the venture, was acting as legal counsel and was bound by the high ethical

principles of his profession. Those principles clearly dictated that he play no part whatever in the corrupt $20,000 payment to the public officials of Jersey City. We are entirely satisfied that the respondent's participation in the corrupt payment, to the extent described earlier in this *per curiam,* was unethical and calls for some measure of discipline.

In *Colsey* (63 N.J. 210) an attorney was disbarred for knowingly participating in a transaction which involved a corrupt payment to satisfy an illegal demand by a public official. However, unlike the situation here, the attorney was not in any sense a covictim, played a very active part in the corrupt transaction itself and "used the fact that he was a member of the bar as part of the mask for the crime by creating the appearance that a professional fee was involved." 63 N.J. at 215. We agree with the position of respondent's counsel that *Colsey* is distinguishable and that disbarment is not called for. But we disagree that "discipline which exceeds reprimand" would be excessive. Reprimand may sometimes be appropriate where there has been a lesser ethical violation not involving corrupt conduct as in *In re Kamp,* 40 N.J. 588 (1963) and *In re Abrams,* 56 N.J. 271 (1970). See also *In re A. and B.,* 44 N.J. 331 (1965). But where, as here, there has been knowing participation in corrupt conduct it would not be at all appropriate and would not represent a responsible discharge of the unfortunately necessary duty placed upon us by Article VI, section 2, paragraph 3 of our Constitution. Though the original creation of the trust fund itself by the respondent was suspect, the record does not permit a finding that it was specifically designed for the illegal payment. But the record does permit and indeed compels a finding that the respondent not only permitted its use for the illegal pay-

ment but knowingly participated in the illegal payment itself by drawing the check and misstating on its face that it was for engineering services. Indeed in the light of Sensibar's testimony we are led to the finding that the respondent did not resist the payment but on the contrary supported it. Surely it must be recognized that such conduct was grossly inimical to the ever-present hope of the elimination of official corruption and the maintenance of high standards in the legal profession.

The determination as to the measure of discipline is difficult and, as we have repeatedly pointed out, "each case must rest largely upon its own particular circumstances." *In re Greenberg,* 21 N.J. 213, 225 (1956); *In re Baron,* 25 N.J. 445, 449 (1957). We have given due consideration to all of the interests involved and the mitigating factors which appear in the record and are set forth by the Committee in its presentment and supplemental report. We have concluded that the respondent's professional dereliction warrants suspension from the practice of law for a period of one year and until further order; judgment to that effect will be entered.